Supreme Court, U.S.
FILED
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

ALEE CELLULAR COMMUNICATIONS, PETITIONER

V.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Federal Communications Commission violate the requirements of 5 U.S.C. § 557 and of 47 U.S.C. § 312 in revoking Alee Cellular Communications' license to operate a system in the Domestic Public Cellular Telecommunications Radio Service on the basis of lack of candor when it affirmed that Alee lacked candor even though neither the Administrative Law Judge nor the Commission made sufficient demeanor or credibility findings?

PARTIES TO THE PROCEEDING

The petitioner in this Court is Alee Cellular Communications. The respondent is the Federal Communications Commission.

CORPORATE DISCLOSURE STATEMENT

Petitioner Alee Cellular Communications ("Alee") provides the following corporate disclosure statement pursuant to Rule 29.6 of this Court:

Petitioner is a general partnership formed for the purpose of filing for and obtaining Federal Communications Commission authorizations from the Respondent in the Domestic Public Cellular Telecommunications Radio Service.

Petitioner has no parent companies as that term is defined in Rule 29.6, and no publicly-held company has a 10% or greater ownership interest in Petitioner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	3
Reasons for granting the petition	9
Conclusion	16
Appendix A	1a
Appendix B	4a
Appendix C	30a
Appendix D	98a
Appendix E	161a
Appendix F	162a
Appendix G	166a

TABLE OF AUTHORITIES

Cases:

Abovian v. INS, 219 F.3d 972 (9th Cir. 2000) 14
Aguilera-Cota v. INS., 914 F.2d 1375 (9th Cir. 1990) 11
Alee Cellular Communications v. FCC, No. 99-1460 (D.C. Cir. Jan. 30, 2001) 1, 7
Alee Cellular Communications v. FCC, No. 99-1460 (D.C. Cir. Apr. 5, 2001) 2, 8
Algreg Cellular Engineering, 12 F.C.C. Rcd 8148 (1997) 6
Algreg Cellular Engineering, 14 F.C.C. Rcd 18524 (1999) 7
Algreg Cellular Engineering, 6 F.C.C. Rcd 2921 (Common Carrier Bureau 1991) 3, 4
Algreg Cellular Engineering, 7 F.C.C. Rcd 8686 (ALJ 1992) 4

Algreg Cellular Engineering, 9 F.C.C. Rcd 5098 (Rev. Bd. 1994) 6
Be-Lo Stores v. NLRB, 126 F.3d 268 (4th Cir. 1997) 9, 10, 12, 14, 15
Blank v. Dep't of the Army, 247 F.3d 1225 (Fed Cir. 2001) 14
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 8
Canteen Corp. v. NLRB, 103 F.3d 1355 (7th Cir. 1997) 15
Hall v. Chater, 62 F.3d 220 (8th Cir. 1995) 11
Huston v. Bowen, 838 F.2d 1125 (10th Cir. 1988) 12
In re Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission's Rules to Implement Section 403(k) of the Telecommunications Act of 1996, 11 F.C.C. Rcd 13072 (1996) 6
Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995) 14
NLRB v. G & T Terminal Packaging Co., 246 F.3d 103 (2d Cir. 2001) 14
Parsippany Hotel Management Co. v. NLRB, 99 F.3d 413 (D.C. Cir. 1996) 11
SEC v. Chenery Corp., 318 U.S. 80 (1943) 8
Saballo-Cortez v. INS, 761 F.2d 1259 (9th Cir. 1984) 15
Smolen v. Chater, 80 F.3d 1273 (9th Cir. 1996) 14
TeleSTAR Inc., Memorandum Opinion and Order, 2 F.C.C. Rcd 7352 (1987) 12
Turcios v. INS, 821 F.2d 1396 (9th Cir. 1987) 12
Williams ex rel. Williams v. Bowen, 859 F.2d 255 (2d Cir. 1988) 12

Statutes:

28 U.S.C. § 1254(1) 2
47 U.S.C. § 402(b)(5) 7
5 U.S.C. § 557 ..... 2, 12
47 U.S.C. § 312 ..... 2, 13

47 U.S.C. § 310(b) 4, 6
47 U.S.C. § 403(k) 6
47 C.F.R. § 22.4 4

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PETITION FOR A WRIT OF CERTIORARI

Alee Cellular Communications petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The Judgment of the United States Court of Appeals for the District of Columbia Circuit, *Alee Cellular Communications v. FCC*, No. 99-1460, slip op. at 1 (D.C. Cir. Jan. 30, 2001) (per curiam), is unreported and is reprinted at App., *infra*, 1a-3a. The Order of the United States Court of Appeals for the District of Columbia Circuit

denying Alee Cellular Communications' Petition for Rehearing and Rehearing En Banc, *Alee Cellular Communications v. FCC*, No. 99-1460, slip op. at 1 (D.C. Cir. Apr. 5, 2001) (per curiam), is unreported and is reprinted at App., *infra*, 161a. The Order of the Federal Communications Commission is reported at 12 FCC Rcd 8148 and is reprinted at App., *infra*, 30a-97a. The Order of the Federal Communications Commission on reconsideration is reported at 14 FCC Rcd 18524 and is reprinted at App., *infra*, 4a-29a. The Initial Decision of Administrative Law Judge Walter C. Miller is reported at 7 FCC Rcd 8686 and is reprinted in relevant part at App. *infra*, 98a-160a.[1]

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on January 30, 2001. The Order of the United States Court of Appeals for the District of Columbia Circuit denying Alee Cellular Communications' Petition for Rehearing and Rehearing En Banc was entered on April 5, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision of the Administrative Procedures Act, 5 U.S.C. § 557 (2000), is reprinted at App., *infra*, 162a-165a. The relevant statutory provision of the Communications Act, 47 U.S.C. § 312 (1999), is reprinted at App., *infra*, 166a-169a.

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[1] A full copy of the opinion rendered by Administrative Law Judge Walter C. Miller has been lodged with the Clerk of Court.

STATEMENT

This case arises from a surrealistic chapter in the annals of administrative law known as the Federal Communications Commission's (FCC's) "cellular lottery". Combining the exuberant frenzy of the Oklahoma Land Rush with a hypertechnical requirement of "letter perfect" applications, the cellular lottery generated bizarre litigation, often with Pickwickian outcomes. While victims of bureaucratic quagmires often criticize the administrative process as Kafkaesque, the cellular lottery's casualties were frequently entangled in scenarios whose authorship could more plausibly be attributed to Mel Brooks.

Apparently frustrated at the time-consuming and litigious comparative hearing process, the FCC instituted and administered a series of lotteries in the 1980s in order to allocate licenses for the operation of cellular systems in various markets throughout the United States of America. Unfortunately, the FCC's cellular lottery itself soon became time-consuming and litigious. This case, for example, involves a cellular lottery held in 1988.

The dispute that culminated in this case arose due to an agreement among a large number of cellular license applicants to share revenue and profits in the event any of them were successful in the FCC's cellular lotteries. The Common Carrier Bureau (the Bureau) of the FCC contended that this profit and revenue sharing agreement, known as the Mutual Contingent Risk-Sharing Agreement (MCRSA), violated existing FCC rules. Alee Cellular Communications (Alee) was one of a group of twenty-one cellular licensees and applicants ordered by the Bureau to show cause why their licenses should not be revoked or applications dismissed for entering into the MCRSA. *See Algreg Cellular*

Engineering, 6 FCC Rcd 2921 (Common Carrier Bureau 1991).

The Bureau's contention that the MCRSA violated existing FCC rules led to a gargantuan hearing involving some twenty-one different licensees and applicants (many of which had by this time won licenses in various lotteries). In the course of the disqualification hearing, numerous other issues arose with respect to the various licensees and applicants, creating additional possible grounds for their disqualification. Prior to the hearing, Alee, a licensee by virtue of winning the lottery for the New Mexico-3 RSA market, voluntarily had disclosed that it had an alien (an individual who was not a United States citizen) in its partnership. Despite Alee's voluntary disclosure, the Bureau designated the following two additional issues against Alee alone: (1) whether Alee lacked candor in failing to reveal to the FCC that it had an alien general partner or that it changed the nature of its partnership; and (2) whether Alee complied with Section 310(b) of the Communications Act, 47 U.S.C. 310(b) (1991), and Section 22.4 of the FCC Rules, 47 C.F.R. § 22.4 (1991). *See Algreg Cellular Engineering*, 6 FCC Rcd at 2928 (¶ 43). These issues were designated after Alee had voluntarily disclosed the alien ownership problem to the FCC.

After a lengthy (two months), sprawling (some 15,000 pages of transcript and 57 witnesses) hearing, the Administrative Law Judge ("ALJ") wrote a lengthy (sixty-five pages), sprawling (seven hundred paragraphs of findings) opinion. With respect to Alee, the ALJ concluded that Alee's license should be revoked because Alee participated in the MCRSA and because of a violation of the limits on alien ownership of a FCC license set forth in 47 U.S.C. § 310(b) (1991). *See Algreg Cellular Engineering*, 7 FCC Rcd 8686, 8750 (ALJ 1992) (Conclusions of Law ¶¶

18-20, 22), *reprinted* at App., *infra,* 153a-154a. The ALJ also found that Alee had demonstrated a "lack of candor" by intentionally failing to disclose the alien's ownership participation in Alee at an earlier date. *See* App., *infra,* 154a (Conclusions of Law ¶ 22).

The ALJ found against the cellular license applicants and licensees on virtually every issue. *See* App., *infra*, 145a-157a (Conclusions of Law ¶¶ 1-30). However, the ALJ did not follow the standard (and necessary) process of listing the witnesses in the case and describing why he found relevant portions of each witness's testimony credible or incredible. Instead, in a case with some 57 witnesses, the ALJ issued the following blanket statement regarding many of the witnesses, which the FCC later deemed to be a "credibility finding":

> Moreover, the 21 applicants and licensees selected a few representative partners to testify on their own behalf in this proceeding. So the Trial Judge was given an evidentiary snapshot of the partnership's equity holders. Based on his observations of the demeanor of those representative witnesses, the Trial Judge concluded that for the most part the individual partner witnesses were a grasping, penurious lot, a sorry bunch of witnesses. They were perfectly willing, indeed anxious, to bend the truth and/or lie outright if they even suspected it would benefit them financially. More importantly, they appeared anxious to find a scapegoat (with money of course) that they could blame for their shortcomings.

App., *infra*, 148a (Conclusions of Law ¶ 9). This "credibility finding" criticizes as "a grasping, penurious lot, a sorry

bunch of witnesses" an unnamed group of witnesses representing twenty-one cellular licensees and applicants. Arguably, more than forty witnesses come within the scope of the ALJ's description. However, a list of the individual witnesses included in the "credibility finding" was not provided. The ALJ's credibility finding does not specify what parts of the witnesses' testimony were rejected, nor does the finding explain the basis for such a rejection. As such, the scope of the ALJ's "credibility finding" is impossible to ascertain.

Approximately four and a half years and an intermediate level of review passed between the release of the ALJ's determination in 1992 and its eventual review by the FCC in 1997. *See Algreg Cellular Engineering*, 9 FCC Rcd 5098 (Rev. Bd. 1994), *recon. denied*, 9 FCC Rcd 6753 (Rev. Bd. 1994). During this time certain relevant statutes were amended and applicable regulations were revised.[2] Upon review, the FCC reversed nearly all of the ALJ's findings. *See Algreg Cellular Engineering*, 12 FCC Rcd 8148, 8151-52 (¶ 1) (1997), *reprinted* at App., *infra*, 33a. Specifically, the FCC determined that participation in the MCRSA did not disqualify parties from holding cellular licenses. *See* App., *infra*, 33a, 43a-60a, (¶ 1, 24-47). Pursuant to its determination, the FCC permitted all of the participants in the MCRSA other than Alee to retain or receive their cellular licenses. *See* App., *infra*, 33a, 91a-96a,

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[2] The *per se* prohibition against alien officers or directors in Section 310(b) of the Communications Act of 1934, 47 U.S.C. § 310(b)(1991), was amended by Section 403(k) of the Telecommunications Act of 1996, 47 U.S.C. § 403(k) (1996). The FCC, in turn, revised its regulations to reduce the restrictions upon alien ownership of communications licensees. *See In re Amendment of Parts 20, 21, 22, 24, 26, 80, 87, 90, 100, and 101 of the Commission's Rules to Implement Section 403(k) of the Telecommunications Act of 1996*, 11 FCC Rcd 13072 (1996).

(¶¶ 1, 95-104). With respect to Alee, the FCC held that (because of a change in the law), the existence of Alee's alien partner also was not a disqualifying factor. *See* App., *infra*, 64a-65a, (¶ 54). However, the FCC endorsed the ALJ's finding that Alee was guilty of a "lack of candor" and that its license must be revoked. In reaching this conclusion, the FCC gave "decisional deference" to the ALJ's "credibility findings," which were a key element of the argument that Alee's misrepresentation to the FCC was intentional. App., *infra*, 80a (¶ 78). The FCC reasoned that the ALJ had the opportunity to hear the witnesses and observe their demeanor, and the FCC had no such opportunity. *See* App., *infra*, 68a, 80a (¶¶ 60, 78).

Alee moved for reconsideration of the FCC's decision, but its petition for reconsideration was denied. *See Algreg Cellular Engineering*, 14 FCC Rcd 18524 (1999), *reprinted* at App., *infra*, 4a-29a. The FCC again concluded that the ALJ's credibility findings were entitled to "decisional deference." App., *infra*, 17a (¶ 14). Alee subsequently petitioned for review to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) pursuant to 47 U.S.C. § 402(b)(5). Alee argued, among other things, that the FCC's reliance upon the ALJ's defective "credibility findings" constituted procedural error and required reversal. The D.C. Circuit affirmed the FCC's decision against Alee, determining that:

> Substantial evidence supported the Commission's determination that Alee Cellular Communications lacked candor. . . . The Commission independently reviewed the record of the evidentiary hearing. . . .

Alee Cellular Communications v. FCC, No. 99-1460, slip op. at 1 (D.C. Cir. Jan. 30, 2001) (per curiam), *reprinted* at App.,

infra, 1a-3a. Alee subsequently petitioned the D.C. Circuit for rehearing en banc, but Alee's petitioned was denied. *See Alee Cellular Communications v. FCC*, No. 99-1460, slip op. at 1 (D.C. Cir. Apr. 5, 2001) (per curiam), *reprinted* at App., *infra*, 161a.

The D.C. Circuit did not confront the credibility finding issue directly, but held that the FCC had "independently reviewed the record" and found "substantial evidence" that Alee lacked candor. *See* App., *infra*, 1a. To the extent that the Court's decision can be construed as a holding that, despite a defective credibility finding, the FCC's decision must be affirmed because other substantial evidence existed that would have provided a sufficient basis for the decision, the D.C. Circuit clearly is in conflict with *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). As determined by this Court, an agency decision "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order. . . ." *Id.* at 94. *See also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962)(". . . an agency's discretionary order [may] be upheld, if at all, on the same basis articulated in the order by the agency itself . . . .").

The FCC explicitly relied upon and twice (in its 1997 decision and in its 1999 decision on reconsideration) gave "decisional deference" to the ALJ's credibility findings. *See* App., *infra*, 80a (¶ 78) and App., *infra*, 17a (¶ 14). The FCC should be taken at its word. At no point in its 1997 decision or in its 1999 decision on reconsideration did the FCC reject the credibility findings or determine how the case would be resolved in their absence.[3]

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[3] Alee concedes that the FCC referred to other evidence as well as the defective credibility findings in describing the basis for its decisions. However, the FCC never stated or otherwise indicated that evidence other

(continued...)

It should be noted that, during the pendency of the dispute described above, Alee has successfully operated its cellular system. On December 4, 2000, the FCC granted renewal of Alee's license, which now is valid through October 1, 2010 for the same market that Alee has always served.

REASONS FOR GRANTING THE PETITION

1. The decision of the D.C. Circuit in this case conflicts directly with the decision of the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) in *Be-Lo Stores v. NLRB (Be-Lo Stores)*, 126 F.3d 268 (4th Cir. 1997). In *Be-Lo Stores*, the Fourth Circuit (*per* Judge Luttig) held that:

> Where an ALJ provides no more than a generalized conclusory statement purportedly incorporating a host of individual comparative credibility determinations with respect to multiple witnesses, we refuse to indulge the presumption that its findings are entitled to the ordinary deference. . . . Otherwise, savvy ALJs could simply ground their judgments in broad, categorical statements that they credit all of one party's witnesses

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(..continued)

than the ALJ's credibility finding, taken on its own, was sufficient to resolve this case. It is impossible to determine whether the FCC would have reached the same result in the absence of the defective credibility findings, especially when the FCC explicitly gave "decisional deference" to those findings.

> and discredit all of the other party's witnesses, and thereby effectively insulate their decisions from meaningful judicial review.

Id. at 279. In *Be-Lo Stores*, the Fourth Circuit rejected the notion that deference should be given by agencies to ALJ credibility findings that are no more than "a generalized conclusory statement." *Id.*

Applying the standard articulated in *Be-Lo Stores*, it is inconceivable that the Fourth Circuit would uphold an agency ruling that gave "decisional deference" to an ALJ credibility finding such as the one in this case:

> Moreover, the 21 applicants and licensees selected a few representative partners to testify on their own behalf in this proceeding. So the Trial Judge was given an evidentiary snapshot of the partnership's equity holders. Based on his observations of the demeanor of those representative witnesses, the Trial Judge concluded that for the most part the individual partner witnesses were a grasping, penurious lot, a sorry bunch of witnesses. They were perfectly willing, indeed anxious, to bend the truth and/or lie outright if they even suspected it would benefit them financially. More importantly, they appeared anxious to find a scapegoat (with money of course) that they could blame for their shortcomings.

App., *infra*, 148a (¶ 9). The Fourth Circuit would have rejected the ALJ's generalized, conclusory credibility finding and reversed the FCC's decision giving "decisional

deference" to the finding. Accordingly, there is a clear conflict between the D.C. Circuit and the Fourth Circuit on the proper standard for credibility findings of administrative agencies.

Though the D.C. Circuit has never expressly adopted minimum standards for "credibility findings," the Court's affirmance of the FCC's decision in this case effectively sanctions generalized conclusory "credibility findings" as acceptable. The D.C. Circuit previously has held that "credibility findings" must be given extraordinary judicial deference. *See Parsippany Hotel Management Co. v. NLRB*, 99 F.3d 413, 425 (D.C. Cir. 1996). Alee does not dispute the D.C. Circuit's position that properly prepared credibility findings are entitled to great deference on appeal. Alee's (and the Fourth Circuit's) position is that, in order to merit great deference, a "credibility finding" must meet certain minimal standards, including specific references to the witnesses and the statements in their testimony to which the credibility findings apply, as well as the articulation of a coherent rationale for the credibility findings.

The D.C. Circuit's affirmance of an agency's "decisional deference" to generalized, conclusory "credibility findings" conflicts with the law in a number of other federal circuits. These circuits have articulated minimal standards for credibility findings and have reversed agency orders when those standards are not met. In *Hall v. Chater*, 62 F.3d 220, 223 (8th Cir. 1995), the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) held that "the ALJ must make an express credibility finding and give his reasons for discrediting the testimony." Similarly in *Aguilera-Cota v. INS.*, 914 F.2d 1375, 1381 (9th Cir. 1990), the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) concluded that the rationale for credibility findings must be "substantial and must bear a legitimate nexus to the finding."

And, in *Williams ex rel. Williams v. Bowen*, 859 F.2d 255, 260-61 (2d Cir. 1988), the United States Court of Appeals for the Second Circuit (Second Circuit) held that "[a] finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record." *See also Huston v. Bowen*, 838 F.2d 1125, 1133 (10th Cir. 1988) ("[f]indings as to credibility should be closely linked to substantial evidence and not just a conclusion in the guise of findings"); *and Turcios v. INS*, 821 F.2d 1396, 1399 (9th Cir. 1987), (credibility findings must be supported by "specific, cogent reasons").[4] Thus, the D.C. Circuit's opinion, which gives nearly absolute "decisional deference" to a generalized, conclusory statement as a "credibility finding," conflicts with decisions in the Second, Eighth, Ninth, and Tenth Circuits, as well as with the *Be-Lo Stores* decision in the Fourth Circuit.

A conflict among the circuits on an issue of administrative law which implicates a large number of federal agency orders is undesirable because it can lead to inconsistent results in similar cases depending upon the circuit in which a petition for review is filed. It also leaves agencies without clear guidance as to how to conform their procedures to the requirements of Section 557(c) of the Administrative Procedure Act, 5 U.S.C. § 557(c) (2000).[5]

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[4] The FCC's own Review Board has demanded that its administrative law judges "make specific demeanor findings in support of . . . candor . . . conclusions" and "specify with particularity the demeanor observations that support . . . credibility conclusions." *TeleSTAR Inc., Memorandum Opinion and Order*, 2 FCC Rcd 7352, 7353 (¶ 11) (1987), *reconsideration granted in part and denied in part and review granted in part and denied in part*, 3 FCC Rcd 2860 (1988), *aff'd by judgment*, 886 F.2d 442 (D.C. Cir. 1989).

[5] Section 557(c) of the Administrative Procedure Act provides in relevant part:

(continued...)

The FCC also is left without clear guidance as to how to conform its procedures to the requirements set forth in the Communications Act at 47 U.S.C. § 312 (1999). This case provides an opportunity to resolve this conflict among the circuits and to establish coherent standards for credibility findings pursuant to the Administrative Procedure Act and the Communications Act.

2. Even if there were not a conflict among the circuits, it is vitally important for this Court to establish at least minimal standards for credibility findings. While the issue presented appears to involve the relatively straightforward application of the general principle established in the Administrative Procedure Act that agencies (and ALJs) must give reasons for their findings, in reality much more is at stake in this case. "Credibility findings" or "credibility determinations" have come to assume a pivotal role in the administrative process. Their importance is reflected in the enormous number of cases at the appellate level where the determinative issue is a "credibility finding" – as well as in the potential for political abuse which the unreviewability of credibility findings threatens.

(..continued)

> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are part of the record and shall include a statement of –
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof.

Recent case law reveals an enormous number of administrative orders appealed to circuit courts where the controlling issue is an administrative law judge's credibility finding. Numerous National Labor Relations Board (NLRB) cases turn on credibility findings as management and labor representatives often present conflicting testimony. *See, e.g., Be-Lo Stores, supra.* An enormous number of Immigration and Naturalization Service (INS) cases (especially in the Ninth Circuit) turn on administrative law judge's findings concerning the credibility of an applicant seeking asylum.[6] Many cases involving payment of social security turn on administrative law judge's findings concerning testimony about pain or disability. *See, e.g., Smolen v. Chater*, 80 F. 3d 1273 (9th Cir. 1996); *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995). In all of these areas, a political judgment to favor a class of litigants (labor or management in NLRB cases, immigrants or the Government in INS cases) can be insulated from judicial review by the artful use of conclusory "credibility findings".

Courts consistently have held that administrative agency decisions based upon ALJ witness credibility findings are entitled to a high level of deference upon review. *See NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). Indeed, such decisions have been described as "virtually unreviewable". *Blank v. Dep't of the Army*, 247 F.3d 1225, 1228 (Fed Cir. 2001). Given the enormous deference accorded these credibility findings, there should be at least some requirement of specificity and cogent reasoning in such findings.

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[6] The majority of these cases, which are readily available by means of an electronic legal database search, are published with an admonition that they are not to be cited as precedent. *But see, e.g., Abovian v. INS*, 219 F.3d 972, 978 (9th Cir. 2000).

In the absence of at least minimal standards, an agency and its ALJs can inoculate themselves from appellate review by relying upon credibility findings when rendering decisions. Indeed, there have been attempts to argue that an agency order making no reference to witness credibility should be affirmed on the theory that it must have been based on an implied credibility finding that cannot be reversed. *See Canteen Corp. v. NLRB*, 103 F.3d 1355, 1363 (7th Cir. 1997). *See also Saballo-Cortez v. INS*, 761 F.2d 1259, 1269, n.4 (9th Cir. 1984) (Pregerson, J., dissenting). The deference afforded credibility findings by appellate courts is understandable. However, this deference militates in favor of at least some definitional standard for an adequate credibility finding. In the absence of such a standard, there is substantial potential for abuse.

As Judge Luttig pointed out in the *Be-Lo Stores* decision, "savvy ALJs" can "simply ground their judgments in broad categorical statements that they credit all of one party's witnesses and discredit all of the other party's witnesses, and thereby effectively insulate their decisions from meaningful judicial review". *Be-Lo Stores*, 126 F.3d at 279. The safeguard provided by judicial review of agency action easily can be short-circuited by using summary credibility findings to wrap political decisions in review-proof packaging. A requirement of specific witness-by-witness findings and coherent reasons justifying those findings is essential to permit meaningful judicial review of administrative action.

Because of the volume of cases involved, as well as the potential that parties will be deprived of the right to a reasoned decision-making process and meaningful appellate review, the Court should utilize this opportunity to establish standards for credibility findings or determinations in

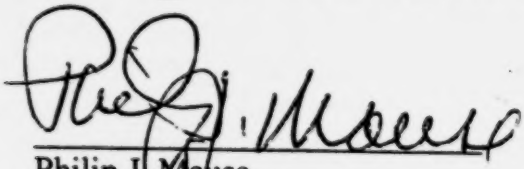
administrative proceedings. This case presents a particularly egregious case of ill-defined and conclusory credibility findings. Therefore, it offers the Court an ideal opportunity to address this important issue in administrative law.

CONCLUSION

For all these reasons, the Petition for writ of certiorari should be granted.

Respectfully submitted,

ALEE CELLULAR COMMUNICATIONS

By: 

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APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1460

September Term, 2000
Filed: January 30, 2001

Alee Cellular Communications,
Appellant

v.

Federal Communications Commission,
Appellee

Alabama Wireless, Inc., f/k/a Algreg Cellular Engineering, et al.
Intervenors

Filed: January 30, 2001

Appeal from an Order of the
Federal Communications Commission

Before: EDWARDS, *Chief Judge,* GINSBURG and RANDOLPH, Circuit Judges.

JUDGMENT

This cause came to be heard on appeal from an order of the Federal Communications Commission, and was briefed and argued by counsel. While the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. *See D.C.* Cir. R. 36(b). On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the order of the Federal Communications Commission in this

case is hereby affirmed, essentially for the reasons stated by the Commission.

Substantial evidence supported the Commission's determination that Alee Cellular Communications lacked candor in failing to reveal that it had an alien general partner and that there had been a change in its partnership structure. The Commission independently reviewed the record of the evidentiary hearing, examining both the testimony of the Alee witnesses and the significant documentary evidence. This evidence was sufficient to support the Commission's conclusion that Alee's partners knowingly and intentionally withheld relevant information from the Commission. Algreg Cellular Eng'g, 12 F.C.C.R. 8148, 8172-80 (1997). The Commission thus had ample basis to sanction Alee for its misconduct. The Commission's decision to revoke Alee's license for its lack of candor lies well within the agency's broad discretion to apply an appropriate sanction to licensee misconduct. West Coast *Media, Inc. v. FCC,* 695 F.2d 617, 622 (D.C. Cir. 1982), *cert. denied,* 464 U.S. 816 (1983).

> Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

FURTHER ORDERED, by this Court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc. See D.C.* Cir. R. 41(a)(1). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
FOR THE COURT:

/s/
Mark J. Langer, Clerk

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 91-142

14 FCC Rcd 18524

In re Applications of ALGREG CELLULAR ENGINEERING; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin; CRANFORD CELLULAR COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne; BAY CELLULAR OF FLORIDA; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497, Mississippi 5 - Washington; FLORIDA CELLULAR; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505, Missouri 2 - Harrison; A-1 CELLULAR COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514, Missouri 11 - Moniteau; CELLULAR PACIFIC; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 346, California 11 - El Dorado, for Station KNKN 252; NORTH AMERICAN CELLULAR; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388, Idaho 1 - Boundary, for Station KNKN 253; ALPHA CELLULAR; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A,

in Market 410, Indiana 8 - Brown, for Station KNKN 340; For assignment of Station KNKN 340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8, RSA; ALEE CELLULAR COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555, New Mexico 3 - Catron, for Station KNKN 271; CRYSTAL COMMUNICATIONS SYSTEMS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606, Oregon 1 - Clatsop, for Station KNKN 309; BRAVO CELLULAR; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579, North Carolina 15 - Cabarrus; ALPHA CELLULAR; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 586, Ohio 2 - Sandusky; CEL-TEL COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589, Ohio 5 - Hancock; EJM CELLULAR PARTNERS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596, Oklahoma 1 - Cimarron; PINELLAS COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613, Pennsylvania 2 - McKean; CENTAUR PARTNERSHIP; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631, South Carolina 7 - Calhoun; SIGNAL CELLULAR COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632, South Carolina 8 - Hampton; A-1 CELLULAR COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio

Service on Frequency Block A, in Market 661, Texas 10 - Navarro; EJM CELLULAR PARTNERS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4 - Niobrara; SATELLITE CELLULAR SYSTEMS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318, Arizona 1 - Mohave, for Station KNKN 268; JAYBAR COMMUNICATIONS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6 - Graham, for Station KNKN 251; DATA CELLULAR SYSTEMS; For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345, California 10 - Sierra, for Station KNKN 250

File No. 10607-CL-P-307-A-89; File No. 10611-CL-P-311-A-89; File No. 10754-CL-P-497-A-89; File No. 10445-CL-P-505-A-89; File No. 10454-CL-P-514-A-89; File No. 10031-CL-P-346-A-88; File No. 06606-CL-MP-90; File No. 06688-CL-MP-90; File No. 10066-CL-P-388-A-88; File No. 10318-CL-P-410-A-88; File No. 04924-CL-AL-1-90; File No. 10074-CL-P-555-A-88; File No. 10078-CL-P-606-A-88; File No. 10673-CL-P-579-A-89; File No. 10909-CL-P-586-A-89; File No. 10912-CL-P-589-A-89; File No. 10567-CL-P-596-A-89; File No. 10808-CL-P-613-A-89; File No. 10720-CL-P-631-A-89; File No. 10721-CL-P-632-A-89; File No. 10409-CL-P-661-A-89; File No. 10116-CL-P-721-A-89; File No. 10037-CL-P-318-A-89; File No. 10042-CL-P-323-A-88; File No. 10029-CL-P-345-A-88; File No. 07080-CL-P-MP-91

MEMORANDUM OPINION AND ORDER AND ORDER ON RECONSIDERATION

Adopted: October 6, 1999 **Released**: October 18, 1999

By the Commission

TABLE OF CONTENTS

Topic	Paragraph No.
I. Introduction	1
II. Background	2
III. Discussion	
A. AALA's Section 22.129. Waiver Request	9
B. Lack of Candor – Alee	12
C. Procedural Issue	17
IV. Conclusion	20
V. Ordering Clauses	21
Appendix A	
Appendix B	
Appendix C	

I. INTRODUCTION

1. By this action, we grant AALA's request that we waive the Commission's rules governing limitations on payments involving settlement agreements.[1] We also grant AALA's request that we dismiss its petition for reconsideration of the

[1] AALA Motion for Rulings Regarding Settlement Agreements or, Alternatively, for Approval and Partial Waiver (filed Feb. 5, 1999) (AALA Motion for Rulings).

Commission's decision in Algreg Cellular Engineering.[2] We also deny the petition for reconsideration of that decision filed by Alee. Finally, we dismiss the petition for reconsideration filed by 2-Way Radio and the Statement for the Record filed by Castle Trust.[3]

II. BACKGROUND

2. The Cellular Corporation (TCC) prepared and filed cellular applications in 428 markets between July 1988 and January 1989. Applications prepared by TCC that won rural service area (RSA) lotteries but which had not been awarded licenses prior to the issuance of the hearing designation order (HDO) in this proceeding included Algreg Cellular Engineering, Alpha (for the Ohio 2 RSA), A-1 Cellular Communications, Bay Cellular, Bravo, Cel-Tel, Centaur, Cranford, EJM, Florida Cellular, Pinellas, and Signal (Applicants). Applications prepared by TCC that had already received licenses when the HDO was issued included Alee, Alpha (for the Indiana 8 RSA), Cellular Pacific, Crystal, Data, Jaybar, North American, and Satellite (Licensees).[4] Each of the Applicants and Licensees participated in a risk-sharing agreement which they subsequently rescinded.[5]

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[2] Algreg Cellular Engineering, *Memorandum Opinion and Order, 12 FCC Rcd 8148 (1997)* (affirming in part and denying in part review of the HDO and the Review Board Decision) (Algreg Cellular Engineering). See also *9 FCC Rcd 5098 (Rev. Bd. 1994)* (Review Board Decision), recon. denied, *9 FCC Rcd 6753 (Rev. Bd. 1994)*, affirming, *7 FCC Rcd 8686 (ALJ 1992) (ALJ Decision), 6 FCC Rcd 2921 (Com. Car. Bur. 1991)* (HDO).

[3] Some of the parties have changed since issuance of the Commission's decision. For clarity, this order will refer to the parties by their original names. The full names that correspond to the abbreviated names in this order are listed in Appendix A, with the exception of the names that correspond to "Castle Trust", which are listed in Appendix B, and with the exception of the names that correspond to "2-Way Radio," which are listed in Appendix C.

[4] Algreg Cellular Engineering at 8152-53.

[5] The risk-sharing agreements provided that, in the event any signatory

3. The Common Carrier Bureau (Bureau) found that the risk-sharing agreements violated sections 22.33(b)(2), 22.922, and 22.921(b) of the rules, which were designed to deter speculative filings that may skew a lottery.[6] The Bureau further concluded that any Applicant that had entered into or was a party to the risk-sharing agreements had filed a defective application that must be dismissed.[7] Additionally, the Bureau determined that participation in the risk-sharing agreements could reflect adversely on the Licensees' qualifications. It therefore designated the Applicants' and Licensees' RSA cellular applications for consolidated hearing and ordered the Licensees to show cause why their authorizations should not be revoked.[8] The Show Cause Order also included lack of candor and alien ownership issues against Alee.[9]

4. Affirming the Administrative Law Judge's (ALJ's) determination that each of the Licensees and Applicants was a willing participant in TCC's risk-sharing scheme, the Review Board summarily dismissed the applications for the RSA markets that were filed by the Applicants and revoked

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applicant won the lottery, that licensee would retain ownership and control of the cellular system, but each signatory to the Agreement would have the right to receive income and sales proceeds from the signatories whose RSA applications had been granted. Algreg Cellular Engineering at 8152-53.

[6] 47 C.F.R. § 22.33(b)(2) (prohibiting partial settlements among nonwireline RSA applicants); 47 C.F.R. § 22.922 (prohibiting the transfer of interests in pending nonwireline RSA applications); 47 C.F.R. § 22.921(b) (prohibiting cross ownership interests in competing nonwireline applications for the same RSA market); see HDO at 2925 (concluding that the reciprocal right to share profits or sale proceeds and the right to inspect the licensee's books conferred by the Agreements are ownership interests within the meaning of section 22.921(b)).

[7] HDO at 2928-31.

[8] *47 U.S.C. § 312* (permitting revocation of an authorization because of conditions coming to the attention of the Commission that would have warranted denial of the original application).

[9] HDO at 2924.

the RSA cellular authorizations held by the Licensees. The Board also affirmed the ALJ's determination that Alee's application, as originally filed, exceeded the limits on alien ownership set forth in section 310(b)(3) of the Communications Act and agreed with the ALJ that this violation was an independent basis for revoking Alee's cellular authorization.[10] In light of its conclusion that the alien ownership issue independently justified revocation, the Board found it unnecessary to reach the ALJ's finding that Alee had intentionally misrepresented the citizenship status of an alien owner and, therefore, lacked candor.[11]

5. In Algreg Cellular Engineering, the Commission granted in part and denied in part applications for review of the HDO and Review Board Decision. The Commission found that the risk-sharing agreements did not create "ownership interests," as expressly required by the multiple ownership (section 22.921(b)) and certification (section 22.923(b)(7)) rules, and that the parties did not have notice that the contractual interests conferred by the risk-sharing agreements would violate either of these rules.[12] The Commission found further that violations of the rules banning partial settlements and pre-grant transfers (sections 22.33(b)(2) and 22.922, respectively) did not render an application defective or adversely affect a licensee's basic qualifications. The Commission concluded that, while the risk-sharing agreements constituted a partial settlement agreement within the plain meaning of section 22.33(b)(2), this violation was not a basis to summarily dismiss the applications or to revoke the licenses.[13]

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[10] Review Board Decision at 5147, 5150.

[11] *Id. at 5147.* The ALJ had found that Alee's management knew that one of the general partners was an alien, but represented to the Commission that the partner was a U.S. citizen. ALJ Decision at 8703-05.

[12] Id. at 8158.

[13] Id.

6. The Commission therefore reversed the Bureau's determinations in the HDO that participation in the risk-sharing agreements rendered the applications defective and reflected adversely on the Applicants' and Licensees' qualifications. The Commission set aside the Review Board's decision dismissing the applications and revoking the licenses. The Commission granted the applications (with the exception of the applications filed by EJM, Centaur and Bravo) and terminated the revocation proceeding with respect to all of the Licensees except for Alee.[14] The Commission also determined that, because the language of section 22.129 of the rules[15] is explicitly limited to agreements to dismiss or withdraw pleadings against a pending applicant, Commission approval was not required for agreements to withdraw or dismiss pleadings filed against a licensee.[16]

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[14] Id. at 8151-52 (the applications filed by EJM, Centaur and Bravo could not be granted based on the record and those applications were remanded to the Bureau for expedited consideration); id. at 8175-81 (finding that Alee's lack of candor concerning its alien general partner warranted revocation of its license).

[15] See paragraph 9 below. Since the filing of the petitions for reconsideration in this proceeding, the Commission has consolidated its previous service-specific rules governing settlement payment limitations (specifically, sections 22.129, 24.429, 27.319, 90.162 and 101.41) into section 1.935 of the rules, 47 C.F.R. § 1.935. For clarity, this order cites section 22.129, upon which the parties herein rely.

[16] Algreg Cellular Engineering at 8180. Specifically, the Commission concluded that the settlement agreement between AALA and Crystal, the licensee of the Oregon 1 RSA market, was outside the scope of section 22.129 and could be effectuated without Commission approval. The Commission likewise determined that the portion of the settlement agreement between AALA and Alpha involving Alpha's authorization for the Indiana 8 RSA was beyond the scope of section 22.129. The Commission found, however, that the portion of the agreement relating to Alpha's pending application in the Ohio 2 RSA market was subject to the provisions of section 22.129 and that further submissions were required before Commission approval could be granted. Algreg Cellular Engineering at 8183-86.

7. AALA, Alee, and 2-Way Radio filed petitions for reconsideration of Algreg Cellular Engineering and Castle Trust filed a Statement for the Record. AALA, all of the Applicants, the remaining Licensees (i.e., Data, Cellular Pacific, Jaybar, North American, and Satellite), and Alee subsequently notified the Commission that they had entered into settlement agreements resolving "all litigation among and between them[.]"[17] At the same time, AALA requested that the Commission either rule that the provisions of section 22.129 limiting payments for settlements to a petitioners' legitimate and prudent expenses do not apply to the settlement agreements involving the Applicants or waive the settlement limitations with respect to the settlement agreements involving the Applicants.[18] In conjunction with the Joint Notice and AALA's Motion for Rulings, AALA and the Applicants filed requests that we dismiss certain pleadings[19] that they had filed in this proceeding.[20]

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[17] Joint Notice of Settlement Agreements and Request for Rulings at 2 and 5 (filed Feb. 5, 1999) (Joint Notice); id. (stating that the designated parties to the Algreg proceeding had reached a "global settlement" resolving their differences).

[18] AALA Motion for Rulings at 1 and 6-16.

[19] See A-1 Cellular Communications, Cel-Tel, Cranford, and EJM Joint Request for Dismissal of Pleading (filed Feb. 5, 1999); Florida Cellular Request for Dismissal of Pleading (filed Feb. 5, 1999); AALA Request for Dismissal of Pleading (filed Feb. 5, 1999) (requesting that the Commission dismiss with prejudice: (1) its petition for reconsideration filed July 3, 1997, seeking reconsideration of the Commission decision to grant the applications of A-1 Cellular Communications (with respect to the Missouri 11 RSA), Cel-Tel, Cranford, EJM, and Florida Cellular, and (2) its consolidated reply to oppositions to petition for reconsideration filed by A-1 Cellular Communications, Cel-Tel, Cranford, EJM, and by Florida Cellular, filed July 28, 1997).

[20] The Office of General Counsel granted AALA's, the remaining Licensees', and Alee's requests filed in conjunction with the Joint Notice that the Commission dismiss certain pleadings that they had filed in this proceeding relating to the remaining Licensees' applications. Algreg Cellular Engineering, Memorandum Opinion and Order at P5, FCC 99I-08 (released Apr. 28, 1999) (granting the remaining Licensees' and Alee's

8. We address AALA's Motion for Rulings and AALA's and the Applicants' requests for dismissal in this order. We also address Alee's and 2-Way Radio's petitions for reconsideration and Castle Trust's Statement for the Record, along with the various responsive pleadings.

III. DISCUSSION

A. AALA's Section 22.129 Waiver Request

9. In conjunction with a comprehensive revision of its rules for cellular services, the Commission in 1994[21] codified in section 22.129 of the rules its settlement policies for cellular applicants.[22] Section 22.129 provides that "parties that have filed . . . a petition to deny, informal objection or other pleading against a pending applicant in the Public Mobile Services and then seek to withdraw or request dismissal of . . . the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the FCC."[23] Such parties must also submit a copy of any written agreement related to the withdrawal or dismissal, and submit an affidavit setting forth certification that the parties have not received any money or other consideration in excess of the

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requests for dismissal and granting in part AALA's request for dismissal "because the settlement agreements between AALA, the remaining Licensees, and Alee are not subject to Commission approval"). The order also severed licensees Satellite, Crystal, Alpha, Data, Cellular Pacific, Jaybar, and North American from the Algreg proceeding on a prospective basis. Id. On May 28, 1999, Castle Trust filed a Petition for Reconsideration of that severance order, which the Office of General Counsel has referred to us for consideration. For the reasons set forth in paragraph 19, infra, Castle Trust's Petition for Reconsideration is dismissed.

[21] See *Revision of Part 22 of the Commission's Rules Governing Public Mobile Services, Report and Order, CC Docket No. 92-115, 9 FCC Rcd 6513, 6514, n.3 and 6586 (1994)* (Part 22 Revision Order).

[22] 47 C.F.R. § 22.129.

[23] 47 C.F.R. § 22.129.

legitimate and prudent expenses incurred in preparing and prosecuting the application or petition.[24]

10. In its motion for rulings, AALA urges that the circumstances of this case justify a waiver of the limitation on settlement amounts under section 22.129 with respect to the proposed settlement agreements involving AALA and the Applicants.[25] Conceding that the consideration that it would receive from the Applicants under the settlement agreements would exceed its legitimate and prudent expenses,[26] AALA contends that a waiver is justified because the differential between its legitimate and prudent expenses and the settlement payments from the Applicants represents only a small fraction of the value of the authorizations at issue.[27] AALA also asserts that it is in the public interest to permit it to withdraw from the proceeding on a mutually agreeable basis insofar as a "change in federal law has precluded . . . [it] from securing the relief . . . [it] originally sought (i.e., a relottery)[.]"[28]

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[24] 47 C.F.R. § 22.129(a).

[25] AALA Motion for Rulings at 9-14. See also AALA Motion for Rulings at 6 (alternatively claiming that the proposed settlement agreements between AALA and the Applicants are subject to the provisions of former section 22.29, which had previously governed settlement agreements involving dismissal of petitions to deny and which did not require parties to submit the agreement to the Commission or to certify that the consideration received did not exceed the legitimate expenses incurred in prosecuting the petition).

[26] See AALA Motion for Rulings at 11 (stating that, through mid-January, it had incurred "collective" legitimate and prudent expenses of $ 3,124,633.13 in the course of litigating the Algreg proceeding; also stating that "the total amount of consideration to be received by [AALA] under all of the settlement agreements they have entered into involving parties to the [Algreg proceeding] . . . is $ 6,300,573," of which $ 4,164,805 would represent settlement payments from the Applicants).

[27] AALA Motion for Rulings at 11.

[28] See AALA Motion for Rulings at 13, citing Balanced Budget Act of 1997, P.L. 105-33, Stat. 258, Section 3002(a)(2), which, except for noncommercial educational broadcast stations and public broadcast

11. We find that a waiver of section 22.129's limitation on settlement payments is warranted under the specific facts of this proceeding.[29] Section 22.129 reflects a balancing of our efforts to discourage the filing of speculative applications and pleadings designed solely to extract money from applicants, while still providing some incentive for legitimate petitioners and applicants to withdraw from proceedings and thus expedite service to the public.[30] In light of the "global" settlement between and among AALA, the remaining Licensees, and the Applicants, we find that a waiver of section 22.129 is justified because it would permit the resolution of a long-standing and litigious dispute between these parties. In addition, a waiver would serve the public interest by removing the uncertainty surrounding the applications at issue in this proceeding stemming from AALA's filings. In this regard, it also appears that AALA did not file its pleadings for speculative reasons or to extract money from the Applicants.[31] We therefore waive the provisions of section 22.129 and approve the settlement agreements between AALA and the Applicants. In addition,

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stations, rescinded the Commission's authority under section 309(i) of the Communications Act of 1934, as amended, to issue licenses by lottery after July 1, 1997.

[29] See 47 C.F.R. § 22.119(a) (the Commission may grant a request to waive the requirements of Part 22 of the rules if (1) the underlying purpose of the rule would not be served or would be frustrated by application of the rule and a grant of the waiver would be in the public interest or (2) in view of unique or unusual factual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest). A waiver of the settlement limitations is also consistent with the objectives underlying the recent announcement to waive settlement payment limitations in certain Wireless Telecommunications Bureau's contested licensing cases. See Public Notice, DA 99-745 (released Apr. 16, 1999).

[30] Part 22 Rewrite Order at 6550.

[31] See Algreg Cellular Engineering at 8184 ("deeming [AALA's] . . . substantial, non-frivolous participation at every stage of this proceeding to be analogous to that of private attorney generals").

we grant AALA's and the Applicants' request that we dismiss certain pleadings that they filed in this proceeding, as identified in footnote 19, above.

B. Lack of Candor -- Alee

12. After winning the lottery in December 1988, Alee filed a section 1.65 amendment on January 9, 1989, which was signed by Alee's signing partner, Robert Bernstein, and prepared by Alee's attorney, William J. Franklin. The amendment listed Shafi M. Sharifan (who was not a U.S. citizen) as one of its 14 partners and inaccurately stated that all of its partners were U.S. citizens. Based upon its independent review of the record and the exceptions, the Commission found that a preponderance of the evidence established that, when Bernstein signed the amendment, he knew that having an alien partner would adversely affect the tentative selectee's chance of getting the construction permit, and he also knew that the information contained in the amendment was false.[32] Finding that Alee understood that this was a matter that could adversely affect the grant of the construction permit and that Alee intentionally concealed the presence of the alien partner, the Commission affirmed the ALJ's determination that Alee lacked candor and revoked Alee's license.[33]

13. Alee contends that Franklin's testimony that the partners comprising Alee had agreed to continue to rely on Sharifan as a partner is not credible because Franklin prepared the amendment knowing that it contained incorrect information.[34] Alee also contends that the Commission's

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[32] Algreg Cellular Engineering at 8175.

[33] Id. at 8176.

[34] Alee Petition at 3; id. at 3-4 (claiming that the Commission describes Franklin's conduct "but thereafter fails to weigh the material differences with Mr. Bernstein's testimony that: (1) he never saw Franklin's covering letter which was addressed to Alan Kane; (2) he received correspondence from Mr. Franklin . . . before and after this covering letter; (3) he did not

reliance on the ALJ's determination that Alee lacked candor is "wholly misplaced" because, "in his comprehensive findings of fact on Alee, the ALJ made not one credibility or demeanor finding about the testimony of [the three partners testifying on behalf of Alee.]"[35]

14. Alee's contentions raise essentially the same arguments that the Commission considered and rejected in Algreg Cellular Engineering. In reaching our conclusion that Alee lacked candor, we were not persuaded by Alee's attempt to impeach Franklin's credibility on the ground that his testimony was internally inconsistent as to whether he knew Sharifan was an alien when he prepared the amendment.[36] The Commission also recognized (as Alee now observes) that the ALJ's adverse credibility findings do not single out Alee's three testifying partners.[37] We nevertheless found that the ALJ's credibility findings were not in conflict with the record evidence and therefore were entitled to decisional deference.[38] Therefore, Alee has presented no new evidence which would warrant our reconsideration.

15. Alee also maintains that the revocation of its license for lack of candor must be reversed consistent with NextWave, and the PCS 2000 MO&O and PCS 2000 NAL companion orders (collectively, PCS 2000).[39] Alee asserts that while it

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know the name of the alien up to the time he signed the amendment; and (4) he understood that the alien problem had been taken care of").

[35] Alee Petition at 4-5 (citing Algreg Cellular Engineering at 8180).

[36] Algreg Cellular Engineering at 8178; id. at 8178-79 (finding that "the questionable nature of certain discrete portions of Franklin's testimony would not require that we reject his entire testimony") (citing *Dorothy O. Schulze and Deborah Brigham, 8 FCC Rcd 442, 444 (1993)).*

[37] Id. at 8180.

[38] Id. (citing *WHW Enterprises v. FCC, 753 F.2d 1132 (D.C. Cir. 1985));* id. (finding it "significant . . . that the ALJ made these credibility findings in the context of the partnerships' efforts to blame all of their legal troubles on Franklin . . . .[, which], of course, is precisely the defense that Alee has invoked here").

[39] Alee Petition at 6. See *NextWave Personal Communications, Inc., 12*

is faulted for voluntarily making its alien disclosure to the Commission on its own initiative, NextWave was given six months to come into compliance with the statutory foreign ownership requirements and was praised by the Bureau for its cooperation in the matter.[40] Alee avers that the basis for the revocation of its license "pales into insignificance when compared with the misrepresentations, lying, forgeries and destruction of relevant records in the PCS 2000 [NAL] case[,]" where the Commission assessed a forfeiture, but did not revoke the licensee's authorization.[41]

16. The relevant facts of NextWave and the PCS 2000 are very different from those of the instant proceeding. In NextWave, the Bureau found no "reliable evidence that NextWave devised its capital structure in bad faith to exceed the foreign ownership benchmark, or deliberately attempted to deceive the Commission or evade its rules."[42] In the PCS

FCC Rcd 2030 (WTB 1997), application for review pending (NextWave) (finding that NextWave Personal Communications, Inc. (NextWave) exceeded the foreign ownership benchmark of Section 310(b)(4) and determining that it was in the public interest to grant C Block broadband PCS licenses to NextWave, conditioned on its restructuring to conform its foreign ownership to the statutory benchmark); PCS 2000, L.P., *Memorandum Opinion and Order, 12 FCC Rcd 1681 (1997)* (PCS 2000 MO&O) (finding that, because PCS 2000 L.P. (PCS 2000) had removed all individuals who may have been responsible for the misrepresentations from its organization, its applications for 15 Broadband C Block Personal Communications Services (PCS) may be granted); PCS 2000, L.P., *Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 1703 (1997)* (PCS 2000 NAL) (determining that PCS 2000, through one of its officers and bidding agents, misrepresented facts to the Commission, lacked candor before the Commission, and otherwise attempted to mislead the Commission to cover up a mistaken bid made during Round 11 of the C Block PCS auctions and, therefore, found PCS 2000 apparently liable for a forfeiture in the amount of $ 1,000,000).

[40] Alee Petition at 5-6.

[41] Alee Petition at 6.

[42] NextWave at 2070-71 ("NextWave cooperated in the . . . process, and produced facts and information the Bureau deemed necessary to resolve its concerns").

2000 NAL, the Commission found that disqualification was not required because, "after learning of the deception [at issue], PCS 2000 moved quickly to take adequate remedial steps by removing from ownership and control positions those responsible for the misrepresentation."[43] In contrast, the Commission found that Alee lacked candor before the Commission concerning its alien general partner. Further, the Commission was "unimpressed by Alee's 'voluntary' reporting of this matter to the Commission in its April 30, 1990 letter to the FCC Secretary" because, even assuming that Alee did not discover the errors in its amendment until early 1990, "it delayed almost four months in advising the Commission of this matter, and even then it failed to make a full disclosure."[44]

C. Procedural Issue

17. 2-Way Radio, a group of entities that had not previously participated as parties in this proceeding, asserts that Algreg Cellular Engineering has adversely affected their applications, which are mutually exclusive with applications granted in that decision.[45] 2-Way Radio claims that, from

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[43] PCS 2000 NAL at 1717 (footnote omitted); id. (finding that it had "every reason to 'anticipate that the future conduct of [PCS 2000] will measure up to the expectations' required upon [*sic*] Commission licensees"); see also PCS 2000 MO&O at 1688 (disqualification is not warranted because the applicant took "aggressive steps to remove from ownership and control positions those responsible for the misrepresentations").

[44] Algreg Cellular Engineering at 8180-81 ("The failure to fully disclose the facts involving Sharifan's participation in Alee in a timely manner, together with Bernstein's dubious testimony on this matter, significantly undercuts the claim that the 'voluntary' reporting of these matters belies any intent to deceive the Commission."); id. (also finding that Alee delayed reporting this matter until after grant of the construction permit, which meant that, instead of dismissing Alee's application, the Commission would have had to institute revocation proceedings).

[45] 2-Way Radio Petition at 2.

the time the risk-sharing agreements first came to the Commission's attention, and until the issuance of Algreg Cellular Engineering, there was no opportunity or need for mutually exclusive applications to formally seek the maintenance of their applications.[46] 2-Way Radio contends that the hearing designation order provided the ALJ and the Review Board "with an extremely limited scope of authority" to determine that the designated applications should not be denied.[47] It asserts that the dismissal of 2-Way Radio's various mutually exclusive applications as a result of Algreg Cellular Engineering represents the "first opportunity, and necessity, to protect their status as mutually exclusive applicants . . . ."[48]

18. Castle Trust, a group of entities which likewise has not previously participated as a party in this proceeding, claims that their pending applications before the Commission with respect to the various markets at issue "plainly" establish their standing herein.[49] Alternatively, Castle Trust argues that good cause exists for the participation of Castle Trust in the on-going deliberations and disposition of this matter.[50]

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[46] 2-Way Radio Reply at 4.

[47] Id. at 5-6.

[48] Id. at 7.

[49] Castle Trust Statement for the Record at 8 n.4 (filed June 26, 1998); see also id. at 6 (contending that their applications "remain pending because two petitions for reconsideration of [Algreg Cellular Engineering] . . . remain pending at the Commission"); see also Algreg Joint Motion to Strike So-Called "Statement of the Record" at i (filed July 22, 1998) (requesting that the Commission "summarily strike" Castle Trust's Statement for the Record and "preclude their participation in this case") (Algreg Motion to Strike).

[50] Castle Trust Statement for the Record at 8 n.4; see also id. at 7 ("seeking reconsideration of the Commission's decision on the same factual and legal bases as those set forth in the petitions for reconsideration already on file").

19. Section 1.106(b)(1) of our rules provides that a petition for reconsideration filed by a person who is not a party to a proceeding "shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding."[51] The Commission's decision in Algreg Cellular Engineering was the culmination of more than seven and one half years of litigation before the Commission. At no stage of the proceedings did 2-Way Radio or Castle Trust seek party status, despite opportunities to do so. As Algreg points out, the Commission released public notices identifying the various permittees as tentative selectees, thereby triggering the petition-to-deny process of section 309(d) of the Act and section 1.823(b) of the rules, which governed petitions to deny against RSA cellular random selection tentative selectees and allowing for a 45-day period for filing petitions to deny.[52] Following the disclosure of the risk sharing agreements, the Bureau in 1990 initiated an investigation and invited interested persons to intervene in the investigation within 30 days, even if they had not filed petitions to deny.[53] Following the investigation, the Bureau issued its hearing designation order.[54] Under section 309(e) of the Act and section 1.223 of the rules, any party in interest who had not been named as a party to the hearing designation order could have requested party status by filing a timely petition for intervention. Neither 2-Way Radio nor Castle Trust intervened in the proceeding at any of these points. We therefore agree with Alpha and Algreg[55] that 2-Way Radio and Castle Trust have failed to show why it was not possible for them to participate in the earlier stages of this proceeding as required under section 1.106(b)(1), and

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[51] 47 C.F.R. § 1.106(b)(1).

[52] Algreg Opposition at 5.

[53] Public Notice, Report No. CL-90-92 (released Jan. 31, 1990).

[54] *6 FCC Rcd 2921 (Com. Car. Bur. 1991).*

[55] See Alpha Opposition at 5; Algreg Opposition at 8; Algreg Motion to Strike at i.

we dismiss 2-Way Radio's petition and Castle Trust's Statement for the Record on this basis.

III. CONCLUSION

20. In light of the above discussion, we grant AALA's Motion for Rulings and its request for dismissal of its petition for reconsideration. We also deny the petition for reconsideration filed by Alee against the Commission's decision in Algreg Cellular Engineering. We also dismiss the petition for reconsideration of that decision filed by 2-Way Radio and the Statement for the Record filed by Castle Trust pursuant to section 1.106 of the rules.

IV. ORDERING CLAUSES

21. ACCORDINGLY, IT IS ORDERED That AALA's[56] Joint Motion for Rulings Regarding Settlement Agreements or, Alternatively, for Approval and Partial Waiver (filed Feb. 5, 1999) (requesting that the Commission approve the settlement agreements involving AALA and Algreg Cellular Engineering, Alpha Cellular (for the Ohio 2 RSA market), A-1 Cellular Communications (for the Missouri 11 and Texas 10 RSA markets), Bay Cellular, Bravo, Cel-Tel, Centaur, Cranford, EJM (for the Oklahoma 1 and Wyoming 4 RSA markets)), Florida Cellular, Pinellas, and Signal IS GRANTED.

22. IT IS FURTHER ORDERED that the settlement agreements filed on February 5, 1999, between AALA and Algreg Cellular Engineering, Alpha Cellular (for the Ohio 2 RSA market), A-1 Cellular Communications (for the Missouri 11 and Texas 10 RSA markets)), Bay Cellular, Bravo, Cel-Tel, Centaur, Cranford, EJM (for the Oklahoma 1 and Wyoming 4 RSA markets), Florida Cellular, Pinellas, and Signal ARE APPROVED.

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[56] See Appendix A.

23. IT IS FURTHER ORDERED That AALA's Request for Dismissal of Pleading (filed Feb. 5, 1999) (requesting that the Commission dismiss with prejudice: (1) the petition for reconsideration filed July 3, 1997 and (2) the consolidated reply to oppositions to petition for reconsideration filed by A-1 Cellular Communications, Cel-Tel, Cranford, EJM, and by Florida Cellular, filed July 28, 1997) IS GRANTED.

24. IT IS FURTHER ORDERED That A-1 Cellular Communications, Cel-Tel, Cranford, and EJM's Joint for Dismissal of Pleading (filed Feb. 5, 1999) (requesting that the Commission dismiss with prejudice the July 16, 1997 opposition to petition for reconsideration filed by AALA on July 3, 1997) IS GRANTED.

25. IT IS FURTHER ORDERED That Florida Cellular's Request for Dismissal of Pleading (filed Feb. 5, 1999) (requesting that the Commission dismiss with prejudice its July 16, 1997 opposition to petition for reconsideration filed by AALA) IS GRANTED.

26. IT IS FURTHER ORDERED That, pursuant to section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Partial Reconsideration filed by Alee IS DENIED.

27. IT IS FURTHER ORDERED That, pursuant to section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by 2-Way Radio[57] IS DISMISSED.

28. IT IS FURTHER ORDERED That, pursuant to section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Statement for the Record and Petition for Reconsideration filed by Castle Trust[58] ARE DISMISSED.

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[57] See Appendix C.
[58] See Appendix B.

29. IT IS FURTHER ORDERED That, pursuant to section 1.46 of the Commission's rules, 47 C.F.R. § 1.46, the Motion for Extension of Time filed by 2-Way Radio on July 25, 1997 IS GRANTED.

Magalie Roman Salas

Secretary

APPENDIX: **APPENDIX A**[59]

A-1 Cellular: A-1 Cellular Communications, Alee, Cel-Tel, Cranford, EJM, and Jaybar
AALA: Applicants Against Lottery Abuse, Buckhead, CAC, CFL, Miller, Skywave, and ZDT
Alee: Alee Cellular Communications
Algreg: Algreg Cellular Engineering, A-1 Cellular, Bay Cellular, Bravo, Cel-Tel, Centaur,
Cranford, EJM, Florida Cellular, Pinellas, and Signal
Alpha: Alpha Cellular
Bay Cellular: Bay Cellular of Florida
Bravo: Bravo Cellular
Buckhead: Buckhead Cellular Communications Partnership
CAC: Cellular Applicants' Coalition
Cel-Tel: Cel-Tel Communications
Centaur: Centaur Partnership
CFL: Thomas Domencich, the Committee for a Fair Lottery
Cranford: Cranford Cellular Communications
Crystal: Crystal Communications Systems
Data: Data Cellular Systems
EJM: EJM Cellular Partners

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[59] This Appendix A identifies the full names that correspond to the abbreviated names in this order, with the exception of the names that correspond to "Castle Trust", which are listed in Appendix B, and the names that correspond to "2-Way Radio," which are listed in Appendix C.

Jaybar: Jaybar Communications
Miller: Miller Communications, Inc.
North American: North American Cellular
Pacific: Cellular Pacific, Data, and North American
Pinellas: Pinellas Communications
Satellite: Satellite Cellular Systems
Signal: Signal Cellular Communications
Skywave: Skywave Partners, Inc.
ZDT: ZDT Partnership

APPENDIX B

The following entities correspond to the name "Castle Trust" as used in this order:

Castle Trust
Orbit Cellular
RSA Cellular Partners
Schuylkill Mobile Fone, Inc.
B. Scott Reardon III
Skyline Cellular Partners
Sunrise Trust
Turnpike Cellular Partners
Walker Trust

APPENDIX C

This Appendix C identifies the entities that correspond to the name "2-Way Radio" as used in this order.

2-Way Radio
A+ Communications, Inc.
Acad-Cell Partnership
Adrid, Antonio E.
Aggarwal, Darsh
American Cellular Operators
American Rural Cellular, Inc.

Bagley, Smith
Batten, Frank, Jr.
Bause Communications, Inc.
Bay Cellular Ltd.
Blow, Robert B.
Brian O'Neill, Inc.
Broadstreet Communication Partnership
Broz, Robert Frank
Campbell, Jerry D.
CEH Cellular
Cellswitch
Cell-Switch
Cellmates L.P.
Cellular 428 Ltd.
Cellular Group One
Cellwave, Inc.
CenterCom Communications
Chase Jr., Derwood S.
Coastal Communications Assoc.
Colvin Cellular Group
Com/Nav Marine, Inc.
Constitution Cellular
Continental Cellular L.P.
Danbury Cellular Telephone Company, Inc.
DC Rowley, Inc.
Derwood, Chase S. , Jr.
Dial One
Dial Three
Dial Two
Diamond Cellular
DiRico, Alfred
Diversified Cellular L.P.
DJK RSA Cellular, Inc.
Douglas, Cynthia Jean
Douglas, James Easterbrooke, III
Douglas, James Easterbrooke, Jr.

Douglas, Kevin Glen
Douglas, Hilah Lewis
Eagle Fibercomm, Inc.
Fibrebond Corp.
Folden, Gene
Foster, Kent S.
Gilcom Cellular, L.P.
Glenn, Robert B.
Goodwin Barclay Robert, Jr.
Guin, Allen L. Jr. dba GI
Haskins, Robert, Inc.
Hermes Cellular Phone
Hetafi, Inc.
High Tower Communications, Inc.
Horizon Cellular Systems
ICC Cellular, Inc.
Independence Day 1988 Cellular Partners
Independent Cellular Systems
Intelligence Technology Corp.
J & J Communications, Inc.
Jefferson
JMP Cellular
Kitsap Cellular, Inc.
KO Communications
LeFleur Cellular Partnership
Maxcell Telecom Plus, Inc.
Mega-Tel Cellular III
Melrose Communications Corp.
Mercury Cellular
Metacomm Cellular Partnership
Midland Communications Corp.
Miller Communications, Inc.
Minerich, Inc.
Miscellco Communications, Inc.
Mobile Communications System
Mobile Teletalk Group

Mosely, Dean M.
Motorola, Inc.
Mountain View Cellular Partners
Mtel Cellular, Inc.
Namaqua Ltd. Partnership
National Billing Company, Inc.
National Cellular Organization
North-Maudlin Cellular Partnership
Northeastern Cellular Partners
Northern Communications
Olympus Teledata
O'Neill, Brian L.
Omni Cellular Communications
Pacific Mobile Group
Palmer Communications
Parker, James D.
Pegasus Cellular Telephone
Philip C. Holt Corp.
Prairie Partners
Providence Journal
R & D Cellular
Randolph Cellular, L.P.
Rawlings, Thomas E.
RD Rowley, Inc.
RSA Cellular Company
Rural Area Cellular Development Group
Sea-Roy
Sierra Cellular Partners
Silverdale Cellular, Inc.
Silver Wings General Partnership
Sonoma Cellular L.P.
Sound Cellular Service, Inc.
Star Cellular
Starfire
Sunde Cellular Communications Inc.
Sunde Cellular, Inc.

Sybarite Communications, Inc.
The Winners
Tibwin Communications Partnership
Townsend Brothers Partnership
TPF Partnership
Trinity
United Cellular Associates
Warner, Mark R.
Warren Cellular, Inc.
WCC Cellular
WestCell Services

APPENDIX C

Before the
Federal Communications Commission
Washington, D.C. 20054

CC Docket No. 91-142

12 FCC Rcd 8148

In re Applications of ALGREG CELLULAR ENGINEERING For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1-Franklin; CRANFORD CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne; NEW ERA CELLULAR TELE-COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 332, Arkansas 9 - Polk; BAY CELLULAR OF FLORIDA For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497, Mississippi 5 - Washington; FLORIDA CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505, Missouri 2 - Harrison; A-1 CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514, Missouri 11 - Moniteau; BRAVO CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579, North Carolina 15 - Cabarrus; ALPHA CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A,

in Market 586, Ohio 2 - Sandusky; CEL-TEL COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589, Ohio 5 - Hancock; EJM CELLULAR PARTNERS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596, Oklahoma 1 - Cimarron; PINELLAS COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613, Pennsylvania 2 - McKean; CENTAUR PARTNERSHIP For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631, South Carolina 7 - Calhoun; SIGNAL CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632, South Carolina 8 - Hampton; A-1 CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661, Texas 10 - Navarro; EJM CELLULAR PARTNERS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4 - Niobrara; SATELLITE CELLULAR SYSTEMS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318, Arizona 1 - Mohave, for Station KNKN 268; JAYBAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6 - Graham, for Station KNKN 251; DATA CELLULAR SYSTEMS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345, California 10 - Sierra, for Station KNKN 250; CELLULAR PACIFIC For facilities in the Domestic Public Cellular Telecommunications Radio Service on

Frequency Block A, in Market 346, California 11 - El Dorado, for Station KNKN 252; NORTH AMERICAN CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388, Idaho 1 - Boundary, for Station KNKN 253; ALPHA CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 - Brown, for Station KNKN 340; For assignment o f Station KNKN 340 in the 340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8, RSA; ALEE CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555, New Mexico 3 - Catron, for Station KNKN 271; CRYSTAL COMMUNICATIONS SYSTEMS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606, Oregon 1 - Clatsop, for Station KNKN 309

CC DOCKET NO. 91-142; File No. 10607-CL-P-307-A-89; File No. 10611-CL-P-311-A-89; File No. 10563-CL-P-332-A-89; File No. 10754-CL-P-497-A-89; File No. 10445-CL-P-505-A-89; File No. 10454-CL-P-514-A-89; File No. 10673-CL-P-579-A-89; File No. 10909-CL-P-586-A-89; File No. 10912-CL-P-589-A-89; File No. 10567-CL-P-596-A-89; File No. 10808-CL-P-613-A-89; File No. 10720-CL-P-631-A-89; File No. 10721-CL-P-632-A89; File No. 10409-CL-P-661-A-89; File No. 10116-CL-P-721-A-89; File No. 10037-CL-P-318-A-89; File No. 10042-CL-P-323-A-88; File No. 10029-CL-P-345-A-88; File No. 07080-CL-P-MP-91; File No. 10031-CL-P-346-A-88; File No. 06606-CL-MP-90; File No. 06688-CL-MP-90; File No. 10066-CL-P-388-A-88; File No. 10318-CL-P-410-A-88; File No. 04924-CL-AL-1-90; File No. 10074-CL-P-555-A-88; File No. 10078-CL-P-606-A-88

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1997; Released: June 3, 1997

By the Commission:

1. By this action, we grant in part and deny in part applications for review of *Algreg Cellular Engineering, 6 FCC Rcd 2921 (CCB 1991)* (HDO), designating the above-captioned applications for hearing and ordering those with authorizations to show cause why their authorizations should not be revoked, and of the Review Board's Decision in *Algreg Cellular Engineering, 9 FCC Rcd 5098 (Rev. Bd. 1994),* recon. denied, *9 FCC Rcd 6753 (Rev. Bd. 1994),* affirming, *7 FCC Rcd 8686 (ALJ 1992).* We reverse the Bureau's determinations in the HDO that participation in risk-sharing arrangements renders the applications defective and reflects adversely on licensees' qualifications, and we set aside the Review Board's decision dismissing the applications and revoking the licenses on this basis. Of the above captioned applications, we find that those filed by EJM, Centaur and Bravo cannot be granted on the record before us and remand them to the Bureau for expedited consideration. We grant the remaining applications and terminate the revocation proceeding with respect to all of the above-captioned licensees, except for Alee. We find that, although Alee's ownership structure complies fully with *47 U.S.C. § 310*(b), as amended by the Telecommunications Act of 1996, its lack of candor concerning its alien general partner mandates revocation of its license. Finally, we conclude that only the settlement agreement involving Alpha Cellular's pending application for the Ohio 2 Rural Service Area (RSA) market requires Commission approval, and we hold that settlement agreement in abeyance pending further submissions by the parties.

I. BACKGROUND

2. Cellular applications filed in 428 RSA markets between July 1988 and January 1989 included two groups, the "East Coast" and the "West Coast," that were prepared by The Cellular Corporation (TCC). Fourteen applications prepared by TCC won RSA lotteries. (Algreg Cellular Engineering, Cranford Cellular Communications, New-Era Cellular Telecommunications, Bay Cellular of Florida, Florida Cellular, A-1 Cellular Communications, Bravo Cellular, TNT, Alpha Cellular, Cel-Tel Communications, EJM Cellular Partners, Pinellas Communications, Centaur Partnership, and Signal Cellular Communications [hereinafter the Applicants].) Nine applications prepared by TCC received RSA authorizations (Satellite Cellular Systems, Jaybar Communications, Data Cellular Systems, Cellular Pacific, North American Cellular, Alpha, Edison, Alee Cellular, and Crystal Communications [hereinafter the Licensees].)

3. With the exception of Alpha, each Applicant filed amendments and each of those with authorizations informed the Commission that they had entered into an agreement styled as the "Mutual Contingent Risk-Sharing Agreement" (MCRSA) from October 28, 1989 through November 28, 1989. Alpha filed an informational statement reporting that it had been erroneously identified as a MCRSA signatory. Subsequent amendments filed by all except Alpha reported either that the agreement was rescinded or that its partners had voted to rescind it. *HDO, 6 FCC Rcd at 2424 P 9.*

4. Drafted by TCC's attorney, William J. Franklin, two MCRSAs, one signed by the East Coast partnerships and one signed by the West Coast partnerships, linked the signatories. The East and West Coast Agreements are identical in all material respects. Each provides that the licensee retains ownership and control of the cellular system, but it accords each signatory the right to receive income and

sales proceeds from any party to the Agreements whose RSA application is granted. Specifically, the Agreements state that beginning three years after commencement of the commercial operation of any cellular system, 50 percent of any "distributed sales proceeds" if the licensee decides to sell the cellular system. In addition, each signatory has the right to inspect the licensee's books and records, the right to review material contracts relating to any proposed sale of the cellular system, and the right to receive regular certified financial statements.

II. HEARING DESIGNATION AND SHOW CAUSE ORDER

5. On May 29, 1991, the Common Carrier Bureau designated for consolidated hearing the above-captioned RSA cellular applications and ordered those with authorizations to show cause why their authorizations should not be revoked. *Algreg Cellular Engineering, 6 FCC Rcd 2921 (CCB 1991).* Construing the MCRSA as an arrangement among fewer than all the applicants in these markets according the parties reciprocal interests in each others' applications, the Bureau found that the Agreements violate 47 C.F.R. § 22.33(b)(2), which prohibits partial settlements among nonwireline RSA applicants. *HDO, 6 FCC Rcd at 2925 P 13.* Those Agreements entered into after the filing of an application were also found to violate 47 C.F.R. § 22.922, which bans the transfer of interests in pending nonwireline RSA applications. *Id. at 2925 P 20.* Additionally, the Bureau found a violation of 47 C.F.R. § 22.921(b), which prohibits cross ownership interests in competing nonwireline applications for the same RSA market. It concluded that, as a matter of law, the reciprocal right to share profits or sale proceeds and the right to inspect the licensee's books conferred by the Agreements are ownership interests within the meaning of section 22.921(b). Id. at PP 17, 19. Because it did not want to encourage unchecked rule violations, the

Bureau refused to credit the parties' efforts to rescind the Agreement, which occurred after the lotteries had been held. *Id. at 2926 P 23.*[1]

6. The Bureau also specified a reporting issue against those Licensees who signed the MCRSAs after filing their applications to determine whether any of them had violated 47 C.F.R. § 1.65 by not timely amending their then-pending applications to report their subsequent execution of the *Agreements. 6 FCC Rcd at 2926,* 2928 PP 22, 43. On the other hand, those Licensees who signed the Agreements before filing their applications were found to have falsely certified their applications, in violation of 47 C.F.R. § 22.923(b)(7), to the extent that their applications did not disclose their participation in the *MCRSA. Id. at 2925 P 20.* Under section 22.923(b)(7) an applicant must certify, inter alia, that there are no undisclosed agreements granting anyone else a direct or indirect ownership interest in the application.

7. Having determined that the Agreements violated the prohibitions against partial settlements, against cross-ownership interests in competing nonwireline RSA applications, and against the transfer of interests in pending nonwireline RSA applications and that the parties' rescission efforts could not be credited, the Bureau concluded that any Applicant who entered such an agreement, or otherwise took

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[1] When this case was designated for hearing cellular applications were handled by the Common Carrier Bureau. Now, however, such applications are within the province of the Wireless Telecommunications Bureau. Moreover, with the completion of most of the licensing of the 428 RSAs, many of the rules at issue here have been deleted as obsolete. *Revision of the Commission's Rules Governing Public Mobile Services, 9 FCC Rcd 6513, 6514 & n.3 (1994).* At the same time, certain rules were also renumbered. For example, section 22.4, setting forth the citizenship requirements for cellular licensees, is now 22.5. *Id. at 6586.* The deletion or renumbering of the rules has no impact on this ongoing RSA proceeding. For clarity, the item cites the original rule numbers.

actions making it a party to the MCRSA's risk-sharing provisions, has filed a defective application that must be dismissed without regard to any mitigation evidence. *Id. at 2927-28 P 39 & nn. 34, 26.* It therefore specified a single issue against the Applicants to determine their involvement in the MCRSAs. *Id. at P 42.*

8. Additionally, the Bureau concluded that participation in the risk-sharing Agreements could reflect adversely on the Licensees' qualifications, but that, standing alone, this would not necessarily be grounds for revocation. *Id. at 2928 P 40.* It therefore initiated revocation proceedings and issued a show cause order against those signatories to the Agreements whose authorizations had already been granted. Id. at PP 37-38. It invoked *47 U.S.C. § 312*(a) of the Communications Act, which permits revocation because of conditions coming to the attention of the Commission that would have warranted denial of the original application. Finally, the Show Cause Order included lack of candor and alien ownership issues against Alee. Id. at 2928, 2931 P 43, n.24.

9. Party status was granted to the Chief of the Common Carrier Bureau, the law firm of Pepper & Corazzini, and to the following entities that had filed petitions to deny or dismiss the pending applications and/or to revoke the authorizations: Applicants Against Lottery Abuses (AALA), The Committee for A Fair Lottery (CFL), Buckhead Cellular Communications Partnership (Buckhead), and Cole Raywid & Braverman (Cole). Id. at P 48. AALA, CFL, and Cole were deemed to have standing because they are or comprise mutually exclusive applicants in markets in which mutually exclusive applications are pending. Id. at 2930 n.8.

III. REVIEW BOARD DECISION

10. The Board affirmed the ALJ's determination, *Algreg Cellular Engineering, 7 FCC Rcd 8686 (ALJ 1992),* that each of the Licensees and each of the Applicants was a willing participant in TCC's risk-sharing scheme. It therefore

summarily dismissed the fifteen cellular applications for the RSA markets that were filed by thirteen applicants: Algreg, Cranford, New Era, Bay, Florida Cellular, A-1 Cellular (two applications), Bravo, Alpha, Cel-Tel, EJM (two applications), Pinellas, Centaur, and Signal. It likewise revoked the RSA cellular authorizations held by Satellite, Jaybar, Data, Pacific, North American, Alpha, Alee, and Crystal. In dismissing the applications and revoking the licenses, the Board, like the ALJ, had no occasion to address arguments that the Bureau erred in determining in the HDO that the MCRSA violated several RSA rules. The Board properly concluded that the issue of whether the specific rules were violated, as opposed to the consequences of such violations, was beyond its jurisdiction under *Frank H. Yemm, 39 RR 2d 1657 (1977).* See also *Atlantic Broadcasting Co., 5 FCC 2d 717, 721 (1966).*

11. The Board also affirmed the ALJ's determination that Alee's application, as originally filed, exceeded the limits on alien ownership set forth in section 310(b)(3) of the Communications Act, but it did not address the related candor issue. *9 FCC Rcd 5098, 5147 P 80.* The Board agreed with the ALJ that the section 310(b)(3) violation was an independent basis for revoking Alee's cellular authorization. *Id. at 5150 P 86.*

12. In addition, the Board certified to the Commission for its consideration a request for approval of a settlement agreement between Crystal and intervenors Buckhead Cellular Communications, Cellular Applicants' Coalition, Miller Communications, Inc., Skywave Partners, Inc., Thomas Domencich, Committee for A Fair Lottery, Applicants Against Lottery Abuses, and ZDT Partnership (hereafter Petitioners), under which Petitioners would withdraw from participating in issues that relate exclusively to the Oregon 1 RSA market. A similar agreement has been

reached with Alpha, the selectee for the Indiana 8 market, and the licensee for the Ohio 2 market.

IV. APPLICATIONS FOR REVIEW

13. Of the thirteen applicants and eight licensees, all except New Era seek Commission review. As New Era did not file an application for review, the dismissal of its cellular application for the Arkansas 9 - Polk market is final. New Era is therefore deleted from the caption.

14. In their Applications for Review, the Applicants and the Licensees allege that the Bureau committed a number of procedural and substantive errors in designating the pending applications for hearing and ordering those with authorizations to show cause why their authorizations should not be revoked. They also challenge the Review Board's determination to summarily dismiss the applications and revoke the licenses on this basis. In addition, Alee appeals the Board's determination that alien ownership is an independent basis for revoking Alee's license and the ALJ's determination that Alee lacked candor concerning its alien general partner.

V. DISCUSSION

1. PROCEDURAL ISSUES

15. We affirm the Bureau's consolidation of the application and revocation proceedings and its decision to allow Petitioners to participate in that consolidated proceeding. By virtue of the fact that their authorizations have become final, the Licensees are in a somewhat different legal position than the Applicants and the designated issues properly reflect that difference. However, the factual foundation underlying those issues -- that is, the risk-sharing scheme and the steps taken to implement that scheme -- is identical for the Applicants and the Licensees. Parallel evidentiary proceedings would have entailed an unacceptable and unnecessary drain on the

Commission's resources, particularly given the number of parties allegedly involved in the risk-sharing agreements.

16. The Licensees concede that, with the exception of Pepper & Corazzini, the intervenors may have standing to participate in the Applicant portion of the proceeding to the extent that they filed applications that are mutually exclusive with the pending applications. Cf. *Orange Park v. FCC, 811 F.2d 664 (D.C. Cir. 1987); Virginia Communications, Inc., 2 FCC Rcd 1895 (1987).* As noted above, the MCRSAs were drafted by TCC's attorney, William Franklin. Franklin was formerly associated with the law firm of Pepper & Corazzini, and various lawsuits have been filed against the law firm as a result of Franklin's involvement with the risk-sharing scheme at issue in this adjudicatory proceeding. The outcome of this proceeding is likely to have an impact on those lawsuits. Accordingly, Pepper & Corazzini is a party in interest with standing to participate in the application proceeding under *FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940).*

17. We do not accept the Licensees' claim that the intervenors' participation in this proceeding should have been limited to the application proceeding. Given the consolidation of the application and revocation proceedings and the common factual questions relating to both Applicants and Licensees, it would have been administratively difficult to ensure that the intervenors' participation in the application proceeding did not spill over into the revocation proceeding.

18. Moreover, third party participation in revocation proceedings is not expressly barred by either *47 U.S.C. § 312* of the Communications Act or 47 C.F.R. § 1.91 of the rules, and has been permitted where special circumstances establish that such participation would be of assistance to the Commission. See *Blue Ribbon Broadcasting, Inc., 90 FCC 2d 1023, 1024 P 3 (Rev. Bd. 1982); Pass Word, Inc., 61*

FCC 2d 410 (1976). Here it was appropriate to accord full party status to the intervenors, who had actively participated in the Bureau's year-long investigation of this matter and who had raised substantial questions of fact and law relating equally to the Licensees and to the Applicants.

2. MCRSA ISSUE

19. For the reasons that follow we reverse the Bureau's conclusions that any Applicant who entered into the MCRSAs has filed a defective application, and that the participation of any Licensee in the MCRSAs potentially affects its qualifications to retain its authorization. We therefore set aside that portion of the Review Board Decision summarily dismissing the applications pursuant to § 22.20 of the Rules and revoking the licenses pursuant to § 312(a)(2) of the Act.

20. As an initial matter, we reject the Petitioners' claim that the request for Commission review of the Bureau's adverse determination concerning the legality of the MCRSAs is untimely. Petitioners urge that, despite the designation of hearing issues as to the facts and circumstances relating to the Licensees' and the Applicants' involvement in the Agreements, the separate conclusion that, as a matter of law, the Agreements contravene sections 22.33(b)(2), 22.921(b), 22.922 of the rules is final and may not be revisited by the Commission.

21. Section 1.115(e)(3) of the rules expressly provides that "applications for review of a hearing designation order issued under delegated authority shall be deferred until applications for review of the final Review Board Decision in the case are filed." Here the decision to conduct evidentiary hearings as to the parties' participation in the Agreements stems from the Bureau's ruling that the Agreements are unlawful under the cellular rules. It is not clear from the face of the order, however, that it contains two

distinct actions and that only the one concerning the legality of the Agreements is immediately appealable. There are, for example, no separate ordering clauses declaring the Agreements to be unlawful as a matter of law. Apart from this lack of notice as to the intended effect of the HDO, Petitioners cite no precedent for such a piecemeal approach, which would clearly undermine the rationale behind the rule against interlocutory appeals of designation orders. Finally, to the extent Petitioners rely on the fact that the order was not simply entitled "Order Designating Applications for Hearing and Order To Show Cause" but also included the phrase, "Memorandum Opinion and Order," the title of the Bureau's order does not change the character of the action contained therein, and we decline to elevate form over substance in this manner.

22. Turning to the merits, the Applicants and the Licensees maintain that the Agreements do not violate the ban against partial settlements, the prohibition against the transfer of interests in pending RSA applications, or the prohibition against cross-ownership interests in competing applications. Specifically, they claim that the RSA rules allegedly violated by the MCRSA pertain only to ownership interests, and that the MCRSAs grant the participants only contingent contractual rights rather than any ownership interests. They note that under the Agreements the Applicant/Licensee retains 100 percent ownership and control of the cellular system, with the other signatories receiving only a share of any income and/or sale proceeds. They emphasize further that the signatories get nothing unless the licensee decides to distribute profits or to sell the station. In the alternative, they claim that, if the Bureau's "expansive" reading of the rules is accepted, they did not have adequate notice that the MCRSAs are unlawful. They urge further that there have been no false certification or reporting violations.

23. The Bureau and the Petitioners counter that the rights created by the MCRSAs are tantamount to those of a non-voting stockholder or a limited partner, both of which have always been cognizable under the cross-ownership rules that apply to cellular applications. See *Cellular Lottery Reconsideration, 101 FCC 2d 577, 600 P 42 (1985).* They further fault the efforts of the Applicants/Licensees to treat ownership and control as equivalent. They point out that the licensee retained control and managerial responsibility even under the earlier, so-called alliance, agreements. (Alliances were less than full market settlements in which a group of applicants agreed that, if selected in the lottery, the tentative selectee would dilute its ownership interest to no less than 50.1 percent and accord each of the other group members an ownership interest of less than one percent. Such arrangements were permissible under an earlier version of section 22.921 that disregarded ownership interests of less than one percent.) Yet, all agree that such alliances constitute impermissible partial settlement agreements under section 22.33(b)(2).

24. For the reasons set forth below, we find that the MCRSAs do not create "ownership interests," as is expressly required by the multiple ownership (section 22.921(b)) and certification (section 22.923(b)(7)) rules, and that the parties did not have notice that the contractual interests conferred by the MCRSAs would violate either of these rules. We find further that violations of sections 22.33(b)(2) and 22.922, which ban partial settlements and pre-grant transfers respectively, do not render an application defective or adversely affect a licensee's basic qualifications. Thus, while the MCRSAs constitute a partial settlement agreement within the plain meaning of section 22.33(b)(2), this violation is not a basis to summarily dismiss the applications or to revoke the licenses. Moreover, as noted in paragraph 3 above, all of the above-captioned applicants and licensees, except Alpha, have voluntarily rescinded the Agreement. Having concluded

that the Agreements violate section 22.33(b)(2), we will require that Alpha likewise rescind the Agreement without determining whether the Agreements also violate section 22.922's prohibition against pre-grant transfer of interests in a nonwireline application.

25. At the outset it is useful to understand the broader context in which the rules at issue in this proceeding were developed. When the Commission decided to select cellular licensees by lottery rather than through comparative hearings, it advised that it would scrutinize carefully any application that appeared to skew the lottery in the applicant's favor. In an effort to encourage settlements, particularly among applicants for markets 31-90 who had filed in anticipation of a comparative hearing, the Commission adopted section 22.33(b), providing for the award of cumulative chances to a joint venture created by a partial settlement among mutually exclusive cellular applicants. Amendment of the Commission's Rules to Allow the Selection from *Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175, 201 P 48 (1985),* recon granted in part and denied in part, *101 FCC 2d 577, 584 P 14 (1985),* further recon *59 RR 2d 401 (1985),* aff'd sub nom. *Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987)* (hereafter Cellular Lottery Rulemaking, Cellular Lottery Reconsideration, and Cellular Lottery Further Reconsideration). At that time, applications for markets below the top-90 had not been filed. The Commission nonetheless provided for the award of cumulative chances to settling applicants in markets below the top-90, who settled after filing their applications. *Id. at 201 P 48.* By according cumulative chances to settling applicants who effectuate joint ventures, the Commission recognized that such arrangements may have been formed for legitimate business purposes. Id. at P 48 & n.73.

26. Concerned that permitting parties to have multiple ownership interests in competing applications for the same market would be an open invitation for manipulation of the lottery process that would needlessly prolong cellular proceedings, the Commission enacted section 22.921 proscribing such multiple ownership interests except that interests of less than one percent were not considered. *Id. 98 FCC 2d at 218 P 79.* In doing so, the Commission sought to give applicants wide latitude in forming business relationships and at the same time maintain consistency and simplicity in the administration of the cellular lottery. Id. It later determined that, given its concern in the cellular context with preserving the integrity and fairness of the lottery process, passive ownership interests held by a non-voting stockholder or a limited partner ownership should be fully attributable. *Recon. Order, 101 FCC 2d at 600-01 P 42.* It explained that disregarding such interests could result in the same individuals having limited partnership or nonvoting stock interests in a number of mutually exclusive applications. Id. This would create cumulative chances, thereby fostering speculative filings and undermining the integrity of the lottery, whether the individuals exercised control or were only passive owners.

27. The one-percent exception to the prohibition against multiple ownership interests, as well as the rule permitting cumulative chances for partial settlements, had the unfortunate effect of encouraging speculative nonwireline applications for markets 91-120, which were filed in contemplation of selection by lottery. In particular, the prospect of obtaining cumulative lottery chances became an incentive for abusive filing schemes by applicants more interested in the applications as an investment than in the opportunity of operating a cellular system. *Recon. Order, 101 FCC 2d at 585-86* PP 15-16. This flood of applications strained the Commission's processing resources, and made it

less likely that bona fide applicants seriously interested in operating a cellular system would ultimately obtain licenses.

28. To deter speculative and abusive filings primarily designed to "stack the odds" in favor of such insincere applicants, the Commission modified section 22.33(b) to prohibit cumulative chances for partial settlements among nonwireline applicants in markets beyond the top-120. Id. at 586-87 PP 17-20. Under the revised rule, partial settlements among nonwireline applicants were still permissible, but cumulative chances were disallowed. *Id. at 588 P 22.* By not prohibiting partial settlements entirely, section 22.33(b) gave nonwireline applicants the flexibility to effectuate joint ventures that were motivated by legitimate business considerations. Id. Moreover, the Commission had experienced no problem with speculative wireline applications. It therefore had no reason to eliminate cumulative chances for wireline applicants that enter into partial settlements. *Id. at 588 P 21.*

29. Notwithstanding the elimination of cumulative chances for nonwireline applicants in partial settlements, the problem of speculative nonwireline filings continued. *Amendment of the Commission's Rules for Cellular Service (Further Notice of Proposed Rulemaking), 1 FCC Rcd 499 P 3 (1986)* (hereafter FNPRM). As part of its ongoing effort to screen out insincere applicants, the Commission proposed, and ultimately adopted, various rule changes that would apply to the processing of RSA cellular applications. *FNPRM, 1 FCC Rcd at 499 P 1; Amendment of the Commission's Rules for Rural Cellular Service, 4 FCC Rcd 2440 P 2 (1988)* (hereafter Third Report and Order). First, to deter filings by speculators, it amended section 22.33(b) to categorically ban all partial settlements among nonwireline applicants. *Third Report and Order, 4 FCC Rcd at 2441-42* PP 14-17. Second, to effectuate the ban on nonwireline partial settlements, it also amended section 22.21(b) to prohibit nonwireline

applicants from having any ownership interest, even those of less than one-percent, in more than one application in a market. *Id. at 2443 P 24.* Finally, to eliminate the delay associated with the pre-licensing assignment or transfer of cellular applications, it amended section 22.922 to prohibit the alienation of any interest in an RSA application before the grant of a construction authorization. *Id. at 2444 P 30.*

30. Despite the common rationale behind these rules (i.e., to deter speculative filings that accord multiple lottery chances), their language is not uniform. In proscribing partial settlements among nonwireline applicants for the RSA, the Commission defined such settlements as an exchange of reciprocal interests. *Third Report and Order, 4 FCC Rcd at 2447 n.3* ("By 'partial settlement,' we mean any arrangement among fewer than all of the applicants in a market that provides reciprocal interests in the applications of the parties to the arrangement."). The prohibition against pre-grant transfers likewise bars the transfer of any interest in or of such applications. *Id. at 2444 P 30* ("we are amending our rules to prohibit the alienation of any interest in an RSA application prior to the grant of a construction authorization."). By contrast, the multiple ownership rule expressly refers to ownership interest, as does section 22.923(b)(7) requiring certification as to who holds an ownership interest in the applicant.

31. Nor do these rules carry identical penalties. The Commission will not approve a partial settlement agreement, but it does not necessarily penalize applicants for entering into such a settlement. See *McElroy Electronics Corporation, 10 FCC Rcd 6762, 6766 & n.6 (1995)* (denying a joint motion for settlement on the ground that it did not constitute a full-market settlement), remanded on other grounds, *86 F.3d 248 (D.C. Cir. 1996),* pet. for rehearing denied (Aug. 19, 1996). By contrast, an application that violates the multiple ownership and certification rules is

deemed to be defective and is summarily dismissed under 47 C.F.R. § 22.20. See, e.g., *Progressive Cellular, 6 FCC Rcd 7178 (1991),* aff'd by judgment, *986 F.2d 546 (D.C. Cir. 1993); Florida Cellular Mobil Communications Corp., 6 FCC Rcd 6910 P 5 (1991),* aff'd sub nom. *Florida Cellular Mobil Communications Corp. v. FCC, 28 F.3d 191 (D.C.Cir. 1994).* Given the severity of this sanction, fairness demands that applicants have explicit notice of what constitutes an "ownership interest" within the meaning of sections 22.921(b) and 22.923(b)(7). See generally *Salzer v. FCC, 778 F.2d 869, 871-72 (D.C. Cir. 1985)* ("fundamental fairness . . . requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by full and explicit notice of all prerequisites for such consideration.")

32. **Section 22.921(b)** With this background in mind, we turn first to the alleged violations of section 22.921(b). The rule expressly bans any party to a nonwireline RSA application from having "an ownership interest, direct or indirect, in more than one application for the same service area." The Court of Appeals has held that the term "ownership" is a flexible one that must nevertheless be interpreted in accordance with the rationale of the provision in which the term is used, and that "the Commission's intent [behind the cellular multiple ownership rule] is to prevent excessive accumulations of chances to win the economic benefits of the license lottery." *Corporate Telecom v. FCC, 55 F.3d 672, 675 (D.C. Cir. 1995)* (emphasis in original). The Agreements at issue here expressly accord the signatories reciprocal rights to receive a share of the income and/or sales proceeds from any party to the agreement whose RSA cellular application is granted. This affords the signatories a financial stake in each others' applications that increases each signatory's chance of participating financially in a winning cellular application, thereby contravening the underlying purpose of the multiple ownership rules (i.e., to

prohibit arrangements that accord multiple chances to participate in the economic benefits of a winning cellular applications). Whatever the underlying purpose of the rule, however, Salzer is clear that the rule must be interpreted in a manner that affords the parties explicit notice as to what the rule proscribes. As noted above, the responsibility to be clear is heightened here because of the severity of sanctions prescribed for section 22.921(b) violations (i.e. revocation of the licensees and dismissal of the applications).

33. Notwithstanding the anti-speculative rationale of section 22.921(b), which would be furthered by an expansive reading of "ownership," we find that the Agreements do not contravene the rule's plain meaning, and that the language of the rule is not sufficiently precise to accord notice that it prohibits the rights conferred on the signatories. Stressing that ownership in the cellular context need not entail the authority to manage or control, the Bureau argues that a signatory's right to a share of a successful RSA applicant's income and/or sale proceeds is analogous to the ownership interests of a non-voting shareholder or a limited partner. Alternately, it submits that this is the type of "indirect" ownership interest that is expressly banned by the rule. The Bureau is correct that, given its overriding concern with deterring speculative applications that skew the lottery and with safeguarding the integrity of the lottery, the Commission made clear from the outset that in the cellular context "owner" includes passive ownership interests as well as those ownership interests that accord managerial control or influence. See *Cellular Lottery Reconsideration, 101 FCC 2d at 600 P 42.* As set forth more fully below, however, we disagree that the Agreements accord rights that are analogous to the ownership interest of a non-voting stockholder or a limited partner.

34. To the extent that the Bureau relies on the express ban against "indirect" ownership, this term generally refers to

ownership through a subsidiary or affiliate rather than through a corporation directly. Moreover, even if the term could reasonably be construed to encompass interests other than ownership interests, as the Bureau appears to argue, it is far too imprecise to afford the explicit notice required where enforcement of a rule leads to harsh results. Thus, we do not find that the express ban against "direct or indirect" ownership interests is sufficiently broad to afford explicit notice that these Agreements would violate section 22.921(b) and thus subject their applications to summary dismissal pursuant to section 22.20 of the rules.

35. Our reading of the Agreements is that they constitute a contract for the payment of money but do not confer any ownership interests, direct or indirect, on the signatories. Specifically, the Agreements provide that, beginning three (3) years from the date of Initial Commercial Operation on an Eligible system, the licensee will receive 50 percent and the signatories will receive 50 percent of "distributed income proceeds" from the operation of the cellular system. (Sec. 2.1). In addition, depending upon the amount of any income proceeds previously distributed to the signatories, the signatories will receive up to 50 percent on any "distributed sales proceeds" from the sale of the cellular system and the licensee will receive the remaining portion of the sales proceeds. (Sec. 3.1). However, the licensee has sole responsibility for the prosecution expenses of its application (Sec. 8.1), as well as exclusive power to direct, control and manage the cellular system. (Sec. 6.1). All property associated with the cellular system is vested in the licensee (Section 5.1). By its express terms, the Agreements are legally enforceable. (Sec. 11.8). For enforcement purposes, the signatories are authorized to inspect each other's books and records, including executed sales contracts and certified financial statements. (Sec. 9.3).

36. Nevertheless, the signatories have no claim to any income proceeds from the operation of any cellular system "except to the extent that the [licensee] elects to make such distribution." (Sec. 2.2). The Agreements expressly provide that the licensee has the sole discretion to determine if income proceeds are to be distributed, as well as the timing and the amount of any such distribution. (Sec. 2.1, 2.2). The licensee also has sole discretion to determine if, to whom, and for how much, the system should be sold. (Sec. 3.2). Sales proceeds are defined as "any sales profits determined in accordance with Generally Accepted Practices" (Art. I), but they may be reduced by the amount of distributed income proceeds previously paid by the selling licensee. (Sec. 3.1). The Agreement also limits the cumulative income proceeds that may be paid to a selling licensee after he has sold his cellular system. (Sec. 2.3). Once the selling licensee has received income proceeds that are equivalent to 125 percent of the amount of the total sale proceeds that he distributed to other participants upon the sale of his cellular system, the selling licensee ceases to be a participant in the agreement and he is not entitled to any further distribution thereunder. (Sec. 2.4).

37. The signatories have no equity interests in any of the competing applications, as would be the case with a non-voting stockholder or a limited partner. And, except for their respective applications and cellular authorizations, the signatories do not have any obligation to contribute any funds towards prosecuting an RSA application or operating a cellular system. Thus, in contrast to the equity interests of a non-voting stockholder or a limited partner, the signatories have only a contingent right to a share of the distributed income or sales proceeds if the licensee decides that income proceeds should be distributed or that the cellular system should be sold. The fact that such payment, if it is made, represents a share of the profits does not mean that the signatories are owners. Not only is the distribution decision

to be made solely by the licensee, the licensee also makes all decisions as to net profit and net loss subject only to "generally accepted accounting practices consistently applied." (Sec. 5.2). This means that, absent a showing of fraud or outright breach of the terms that govern such distribution, a disgruntled signatory cannot challenge a licensee's decision to make no distribution or to include only a portion of revenue in such distribution, or otherwise take legal action to force a distribution. Thus, while a licensee not wishing to forego any economic benefit from the cellular system must include the signatories in any distribution of profits and must divide such distribution according to the ratio set forth the Agreements, he has sole discretion over the timing of and amount of revenue to be included in such distribution.

38. The Petitioners (see P 12, above) urge that, because the decision to pay a dividend ultimately rests with the corporate board and the decision to distribute partnership profits rests with the general partners, the signatory's right to a share of the profits (or sales proceeds) is legally indistinguishable from that of a non-voting stockholder or a limited partner. Citing *United States v. Byrum, 408 U.S. 125 (1972),* the Petitioners note further that, as a practical matter, a non-voting stockholder can compel the payment of a dividend only in limited circumstances. We find these arguments unpersuasive. Whatever the likelihood of a court actually ordering the payment of a dividend to a non-voting stockholder, the corporate officer has a fiduciary duty to the stockholder because the stockholder is an owner of the corporation. Under these Agreements, however, the licensee owes no special fiduciary duty to the signatories, as it would to a stockholder or a limited partner.

39. We note, moreover, that the Agreements further limit the total amount of income or sales proceeds distributions that a signatory may receive under certain circumstances. As such,

the contingent right to future payments is more analogous to the right of a creditor to receive a fixed sum of money in the form of principal and interest, or to the right of an executive to receive monetary payments under a phantom stock plan. Such phantom stock plans confer on key employees the financial benefits of stock ownership (i.e., dividends and appreciation in the value of the stock), without granting them an equity interest or requiring them to make capital contributions. Notwithstanding Petitioners' attempt (Consolidated Opposition at 11) to equate an ownership interest with the right to share profits, a well known treatise on corporations, cited by Petitioners, makes it clear that an ownership interest entails a share of the equity as well as a share of the profits:

> Debt and equity securities represent totally different relationships between the issuer and the security holder. Equity securities represent ownership rights which, in varying degrees, depending on the type of equity security, entitle the holder to a right to participate in surplus profits, and, upon dissolution, to share in those assets that remain after all debts have been paid. On the other hand, debt securities require the issuer to repay the principal amount loaned to the corporation by fixed maturity date, and to do so at a stated rate of interest. The difference between the ownership and creditor interests is one that cannot be erased by mere labels. (emphasis added.)

6A W. Fletcher, Cyclopedia of the Law of Private Corporations § 2635 (rev. perm. ed. 1989) (footnotes omitted).[2] Here the signatories have no right upon

[2] Petitioners' reliance on judicial definitions of "security," for purposes of the Securities and Exchange Act is misplaced. Petitioners cite the holding

dissolution to a share of the licensee's assets after the satisfaction of all debts and no obligation to make capital contributions to the licensee. Instead, like ordinary creditors or phantom stockholders, they have a contractual right entitling them to a payment of money in the future, and that right is legally enforceable. To protect their present right to future payments from any party to the Agreement whose cellular application is granted, built, operated, and/or sold, the signatories can protect themselves against fraud and self-dealing by inspecting the licensee's books, certified annual financial statements and any executed contract for the sale of the cellular system. There is no merit, however, to the Petitioners' suggestion that these rights enable a signatory to sue the licensee for mismanagement. The Agreement is quite clear that all decisions as to net profit and net loss, as well as the calculation of sales proceeds, is subject only to Generally Accepted Accounting practices. (Sec. 5.2, Art. I) Thus, a signatory, unlike a limited partner or a non-voting stockholder, has no redress against mismanagement and waste.

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in *Siebel v. Scott, 775 F.2d 995, 998 (D.C. Cir. 1985)* (citations omitted), that a limited partnership interest entails "an investment of money in a common enterprise with profits to come solely from the efforts of others" warranting protection under the Act. See also *United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975)* ("The touchstone [of a security] is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, this Court has meant either capital appreciation resulting from the initial investment, . . . or a participation in earnings resulting from the use of investors' funds.") Even assuming any of this is relevant, here the signatories, although arguably entitled to payments derived from the efforts of others, have not invested any capital in a common enterprise or otherwise purchased ownership interests. The money each has spent preparing its own application is not available for use by the successful licensee, as would be the case with a limited partner or a non-voting stockholder investing money in a common enterprise.

40. In view of the foregoing, we conclude that the Agreements did not accord the participants "ownership interests" in each others' applications. We therefore determine that the Agreements did not contravene the plain meaning of section 22.921(b). In so concluding, we nevertheless recognize that, unless the licensee is prepared to forego the economic benefits of the cellular system, it must pay 50 percent of the "distributed income proceeds" to the signatories, and, if it decides to sell, up to 50 percent of the "distributed sales proceeds," depending upon the amount of any income proceeds already distributed to the signatories. In this respect, the Agreements accord the signatories genuine rights to share in the economic benefits of all the winning cellular applications for the RSA. This is exactly the type of arrangement skewing the lottery that the Commission intended to prohibit when it amended its rules concerning multiple ownership, partial settlements, and transfers of interests in RSA nonwireline applications and authorizations in its continuing effort to deter speculative filings that undermine the integrity of the lottery process by enabling an applicant to participate in more than one application. *Third Report and Order, 4 FCC Rcd 2440 (1989).* Whatever the underlying intent of the rule, however, its express language is not sufficiently precise to encompass the interests at issue here, and on this basis we find that there has been no violation of section 22.921(b). And, given the rule's explicit reference to "ownership interest," we conclude that it fails to afford explicit notice that it prohibits the type of arrangement at issue here.

41. **Section 22.33(b)(2)**: The parties to the Agreement argue that section 22.33(b)(2), like section 22.921(b), pertains only to ownership interests and that there is therefore no violation of this rule. Specifically, they read the rule as banning only those agreements that involve an exchange of reciprocal ownership interests or of interests that entail the ability to manage or control the application. To support this

interpretation, the parties point to nothing in the rule, the Third Report and Order or elsewhere expressly setting forth their asserted two-pronged definition of partial settlements. And, while they offer a myriad of examples to demonstrate that arrangements involving ownership or managerial interests do constitute impermissible partial settlements, they offer nothing to support the contention that these are the only arrangements that violate section 22.33(b)(2)'s absolute prohibition against partial settlements among nonwireline applicants for the same RSA market.

42. Moreover, we find nothing in the language of rule, its underlying purpose, or its administrative history, to support this restrictive reading of the rule. The rule, which was adopted before the execution of the MCRSAs, expressly provides that "partial settlements among non-wireline applicants for Rural Service Areas are prohibited." The purpose and history of the rule do not give us any basis to depart from the clear language of the rule. In revising the RSA rules, the Commission defined partial settlement as "any arrangement among fewer than all the applicants in a market that provides any reciprocal interests in the applications of the parties to the arrangement." *Third Report and Order, 4 FCC Rcd at 2447 n.3* (emphasis added). It advised further that the term "partial settlement" includes the so-called alliance agreements, whereby each participant in the alliance agreed that if it won a particular market, it would retain at least 50.1 percent of the application and the other members of the alliance would each acquire a maximum .99 percent ownership interest in the winning application. Id. This strongly suggests that the definition encompasses, but is not limited to arrangements that, like alliances, involve an exchange of ownership interests.

43. It is also instructive that, when the Commission adopted section 22.33(b)(2)'s absolute bar on all partial settlements between nonwireline RSA applicants, it also amended

section 22.921(b) to eliminate the one-percent rule for nonwireline RSA applicants. *Id. at 2443 P 24.* This change was necessary to implement section 22.33(b)(2) because the one-percent exception to the multiple ownership rule had provided a basis for partial settlements among MSA applicants. Id. Far from demonstrating that partial settlements are limited to ownership interests, however, the simultaneous consideration of sections 22.921 and 22.33(b) in the Third Report and Order makes it clear that the ban on partial settlements is not limited to ownership interests. Otherwise, the prohibition against partial settlements would be redundant: section 22.921(b), as amended by the Third Report and Order, necessarily precludes any partial settlement among nonwireline RSA applicant that involves an exchange of reciprocal ownership interests. In other words, if the Commission had intended to proscribe only partial settlements among nonwireline RSA applicants that involve reciprocal ownership interests, it did not need a separate rule to do so.

44. Thus, to the extent that the parties rely on earlier discussions of partial settlements that focused on agreements involving an exchange of ownership interests, we note that, before the elimination of the one-percent rule in the Third Report and Order, it was perfectly permissible for applicants to enter into arrangements in which all but one of the applicants would dismiss their applications in exchange for ownership interests of less than one percent in the remaining application. It is therefore not surprising that previous discussions of partial settlements would have been couched in terms of ownership interests. Nor does *GEM Cellular, 2 FCC Rcd 4499 (1987),* support the contention that contractual rights are beyond the rule's reach. That case involved MSA, rather than RSA, applicants. In contrast to the absolute ban on partial settlements among nonwireline RSA applicants, section 22.33(b) allows partial settlements among MSA applicants but disallows any cumulative

chances derived therefrom. The issue was therefore whether the settlement agreement violated either the one-percent rule or the prohibition against cumulative chances, neither of which apply to RSAs applicants, who may not participate in partial settlements under any circumstances. This does not establish that an agreement among nonwireline RSA applicants is permissible under section 22.33(b) if it confers contract rights.

45. Moreover, a restrictive interpretation of section 22.33(b)(2) would totally frustrate the expressed purpose of the ban against partial settlements. In this respect, the absolute partial settlement ban adopted in the Third Report and Order was one of a series of measures taken by the Commission to combat the problem of speculative applications that accord cumulative chances to share in the economic benefits of winning the lottery for a particular RSA market. As Petitioners argue, partial settlements among nonwireline RSA applicants create financial safety nets that encourage the filing of speculative applications and delay service to the public whether they involve reciprocal interests or only reciprocal ownership interests. Arrangements that enable participation in the economic benefits of a cellular system even if one's own application is not the lottery winner likewise create a risk-free investment climate whether or not the transferred interest constitutes an ownership interest or permits the exercise of managerial control. Thus, the stated intent behind the rule -- to prevent the excessive accumulation of lottery chances that encourages speculative "lottery" tickets -- confirms that when the Commission outlawed "any reciprocal interest" it did not mean to outlaw only "reciprocal ownership interests." For these reasons, it is clear that the MCRSAs violate the absolute ban on partial settlements among nonwireline applicants set forth in section 22.33(b)(2), the expressed purpose of which was to bar abusive application practices

that squander the Commission's time and administrative resources.

46. To the extent that the parties claim that the term "interest" is too imprecise to afford notice that it would encompass the contingent rights created by the Agreements, it is appropriate to consider the severity of the sanction involved. As noted in paragraph 31 above, the appropriate remedy for participating in a partial settlement is to disapprove the partial settlement. We are unaware of any Commission precedent -- and neither the Bureau nor the Petitioners has cited such precedent -- that would warrant dismissing the applications, or disqualifying the licensees because of their participation in a partial settlement. We note, for example, that, when the Commission eliminated the cumulative chance policy for future filings, it instructed the staff to identify applicants that appeared to be a part of an orchestrated scheme to skew the odds of winning the lottery in a particular market. It advised that such applicants were to be given a choice of either dismissing their applications, amending them to withdraw from the prefiling agreement, or maintaining them as originally filed. *Recon. Order, 101 FCC 2d at 585-86 P 16 & n. 22,* citing Public Notice, Common Carrier Bureau to Return Defective Cellular Applications and Permit Withdrawal from Pre-filing Settlement Agreements in Markets 91-120, Report No. C-291 (Apr. 10, 1985). More recently, in *McElroy Electronics Corporation, 10 FCC Rcd 6762 (1995),* remanded on other grounds, *86 F.3d 248 (D.C. Cir. 1996),* pet. for rehearing denied, the Commission considered a settlement agreement that purported to be a full-market settlement. The Commission disagreed that the settlement was a full-market settlement and disapproved it on this basis. *Id. at 6766 & n.6.* In doing so, however, the Commission did not penalize, or even address whether it should penalize, the parties for their participation in the partial settlement.

47. We note, moreover, that all of the above-captioned applicants/licensees except Alpha have voluntarily rescinded the Agreements. Alpha is both a licensee and an applicant. It denies that it was ever a party to the Agreements. Nevertheless, the Review Board determined *(9 FCC Rcd at 5140 P 66)* that Alpha was a party to the Agreements. Based upon our review of the record, we conclude that the totality of the evidence supports the Board's determination. Our conclusion that the Agreements contravene the plain meaning, as well as the underlying rationale, of section 22.33(b)(2) warrants no further action with respect to those licensees and/or applicants that have already rescinded the Agreement. Given our determination herein that the Agreements violate the ban on partial settlements, however, it is appropriate to require that Alpha join in the rescission of the Agreements.

48. **Section 22.922**: Section 22.922, like section 22.33(b)(2)'s ban on partial settlements, contains the generic reference to "interest," rather than to "ownership interest." Again, the remedy for engaging in a pre-grant transfer is not revocation or dismissal of one's application as defective; rather the remedy is to either waive the rule and permit the transfer or to deny the waiver and disallow the transfer. See *Catherine L. Waddill, 8 FCC Rcd 2169,* 2171-72 PP 13, 19-20 (1993) (section 22.922 violations were not a basis for revocation or other remedial sanction against a licensee). See also Amendment of Section 22.922 of the Commission's Rules to Permit Limited Transfers and Assignments of RSA Applications in *Rural Service Areas, 5 FCC Rcd 3265,* 3265-66 PP 4-5 (1991) (recognizing that section 22.922's overbreadth had engendered a profusion of waiver requests). Thus, having concluded that the MCRSAs violate the plain meaning of section 22.33(b)(2) and that it is appropriate to recognize the parties' rescission of the agreements and to require Alpha to likewise rescind the Agreement, we need not determine whether the Agreements would also violate

section 22.922's explicit ban on pre-grant transfers of interests in nonwireline cellular applications for the RSA market.

49. **False certification and Reporting Issues**: There is some ambiguity as to whether the false certification and reporting issues apply to the Applicants, or only to the Licensees. On the one hand, the issue specified against the Applicants is limited to their actual involvement in the *MCRSAs. See 6 FCC Rcd at 2928 P42.* On the other hand, the text clearly contemplates that, if it is concluded that the Applicants entered into the MCRSAs, possible violations of sections 22.923(b)(7) (false certification) and 1.65 (failure to report) should also be considered. Id. at P39. We need not resolve this question, however, since we determine that none of the signatories to the MCRSAs violated either the false certification or the reporting rules.

50. Section 22.923(b)(7) requires certification by an RSA applicant that no one other than the named applicant has an ownership interest in the application. Having concluded that the MCRSAs do not confer ownership interests on the signatories, we determine that participation in the MCRSAs did not have to be disclosed when the applications were filed. Thus, those signatories who executed the MCRSAs prior to filing their applications had no obligation under section 22.923(b)(7) to disclose the existence of the MCRSA when filing their applications. By the same token, those signatories who executed the MCRSA after filing their applications did not violate section 1.65 of the Rules. Under section 22.918(b), the tentative RSA selectee has 30 days following the release of the Public Notice announcing the lottery results to report any information required by section 1.65. Section 1.65, in turn, requires the reporting of substantial changes in one's application. However, the MCRSAs did not create any ownership interests that had to be disclosed on the application, pursuant to section

22.923(b)(7). Thus, the signatories' subsequent execution of the MCRSAs was not a reportable event under section 1.65. There was therefore no reporting violation.

3. OTHER MATTERS

51. Having concluded that participation in the risk-sharing agreement is not a basis for denying any application or revoking any license, we turn to matters that are unrelated to the risk-sharing agreement. For the reasons stated below, we revoke Alee's license for lack of candor, terminate the revocation proceedings with respect to the other licensees, remand the applications of EJM, Centaur and Bravo to the Bureau to permit consideration of certain amendments, and grant the other applications. In doing so, we recognize that, apart from the MCRSA issue, the Initial Decision contains additional reasons for disqualifying virtually all of the applicants and revoking virtually all of the licenses. See generally, *7 FCC Rcd at 8750-51,* Conclsions PP 21-30. As noted in P 7 above, the only issue specified against the applicants pertained to their involvement in the MCRSAs. As to the licensees, the Bureau specified alien ownership and lack of candor issues against Alee, and the ALJ added abuse of process issues against Satellite, Crystal, Pacific and North American. In addition to his adverse findings on all the specified issues, the ALJ made adverse findings against the licensees and the applicants where no formal issues were ever specified. The latter conclusions were procedurally improper in the absence of formal issues, see *West Coast Media, Inc. v. FCC, 695 F.2d 617, 619 (D.C. Cir. 1982),* cert. denied, *464 U.S. 816 (1983),* and the Review Board properly vacated several such findings on that narrow procedural ground without pursuing them further. *9 FCC Rcd at 5150 P 85.* We affirm this action, as well as the Board's cancellation of the forfeitures that the ALJ imposed against licensees Satellite, Crystal, Pacific, and North

American on the abuse of process issue. Given its determination on the MCRSA issue, the Board had no occasion to consider the merits of exceptions that concerned such findings relating to undesignated issues, other potentially disqualifying issues, or certain interlocutory rulings.

52. The pending applications for review do not challenge the ALJ's adverse findings on these non-issues, the Review Board's vacation of certain findings on procedural grounds, or its failure to resolve other disqualifying issues. Nevertheless, in view of our conclusion that participation in the risk-sharing agreement is not a basis to dismiss any application or revoke any license, we have independently reviewed the Initial Decision, the parties' Exceptions, and the evidentiary record compiled in this proceeding to determine whether there is any impediment to the grant of any pending application or any basis to institute further revocation proceedings against any licensee. Based upon that review, we find there are no substantial and material questions of fact warranting the specification of further issues against any of the applicants. Because the applications of EJM, Centaur, and Bravo cannot be granted based upon the record before us, however, we remand them to the Bureau to permit expeditious consideration of the further submissions described in paragraphs 81 and 83 below. We grant the remaining applications. And, having reviewed the record regarding the licensees, we revoke Alee's license for lack of candor and terminate the revocation proceeding with respect to the other licensees. We note that, even assuming that the ALJ's findings on various nondesignated matters are valid and that further administrative sanctions might be appropriate under other circumstances, none of the misconduct catalogued by the ALJ is within the one-year statute of limitations for imposing a forfeiture. Furthermore, we see no basis under the facts and circumstances to exercise our discretion under 312(a) of the Act to institute further

revocation proceedings against any licensee. See *MCI Telecommunications Corporation, 3 FCC Rcd 509, 513-14 P 47 & n.18 (1988),* aff'd sub nom. *Telestar, Inc. v. FCC, 886 F.2d 442 (1989),* cert denied, *498 U.S. 812 (1990)* (section 309's substantial and material question of fact standard does not apply to the Commission's exercise of its discretion in the revocation context).

A. ALIEN OWNERSHIP

53. The ALJ determined *(7 FCC Rcd at 8749 P 16)* that EJM and Alee had violated the restrictions on alien ownership in *47 U.S.C. § 310*(b)(3) of the Communications Act and 47 C.F.R. § 22.4(b) of the Commission's rules, and that this was a separate reason to revoke Alee's authorization and to deny EJM's application. As set forth below, we find that, due to changes in the statute and in the Commission's related policies since the grant of Alee's authorization became final, the public interest would not be served by revoking Alee's license or instituting forfeiture proceedings on this basis. We therefore modify that portion of the Board's decision *(9 FCC Rcd at 5147-48 P 80)* that held, in accordance with the law in effect prior to the Telecommunications Act of 1996, that the inclusion of an alien general partner in Alee's initial application was an independent ground for revoking Alee's license. Also, as no alien issue was ever specified against EJM, we will vacate the ALJ's findings with respect to EJM, which the Board did not review, and grant its pending application, which comports with the current restrictions on alien ownership set forth in the Act and in applicable Commission rules and policies.

54. **Alee** We find that Alee complies fully with section 310(b)(3), as amended by 403(k) of the Telecommunications Act of 1996, inasmuch as the four percent equity/voting interest of the alien general partner included in its original application falls far short of the 20 percent limit benchmark

on stock that may be alien owned or voted. See Amendment of the Commission's Rules To Implement Section 403(k) of the *Telecommunications Act of 1996 (Citizenship Requirements), 11 FCC Rcd 13072 (1996)* (to implement the statutory elimination of the per se prohibition against alien officers or directors, the Commission modifies certain policies treating certain alien partners as the equivalent of officers and directors for section 310(b) purposes). Given these changes, we do not believe that the public interest would be served by disturbing or instituting a forfeiture proceeding with respect to the now-final grant of Alee's license. *Continental Cellular, 6 FCC Rcd 6834, 6838 P 13 & n.24 (1991).* However, for the reasons set forth in paragraphs 57-79 below we resolve a related candor issue against Alee and revoke its authorization on that basis.

55. **EJM** No alien ownership issue was ever specified against EJM affording it appropriate notice, as required by the Administrative Procedure Act, *5 U.S.C. § 554*(b)(3), of the matters of fact and law asserted. Under these circumstances, the ALJ's premature findings regarding EJM's alien ownership must be vacated. Nevertheless, we lack statutory authority to grant EJM's application unless it complies with section 310(b)(3) of the Act. In this regard, the ALJ determined that the alien in question, Long B. Vu, is a partner of W.L. Communications, which itself is a general partner of EJM. Prior to enactment of the Telecom Act and changes to various related Commission rules and policies, general partners were considered to be the equivalent of corporate officers and directors for purposes of the statute. Thus, when EJM filed its application, Mr. Vu's interest in one of EJM's general partners would have violated the statute per se unless he was a limited partner adequately insulated from its management. With the elimination of the prohibition against alien officers or directors and corresponding changes in applicable rules and policies, however, whether EJM complies with section 310(b)(3) depends on the amount of

W.L. Communications' ownership and/or voting interest in EJM, and the extent to which Mr. Vu's ownership and/or voting interest in W.L. Communications is attributable to EJM. In this regard, the record reflects that W.L. Communications has only a 2.29 percent partnership share in EJM. (Buckhead Ex. 23, p.5). Thus, even if Mr. Vu has a controlling interest in W.L. Communications, the alien ownership of EJM will not exceed 2.29 percent, an interest that is well within section 310(b)(3)'s 20 percent benchmark. See *Wilner & Scheiner, 103 FCC 2d at 522 P 20 & n.51.* Accordingly, there is no section 310(b)(3) violation under current law.

56. We recognize that, in applying the current restrictions on alien ownership, rather than the more stringent restrictions in effect when EJM filed its application, we are departing from precedent that participation by an alien general partner is a major defect that renders a cellular application ungrantable and subject to immediate summary. dismissal. See *Continental Cellular, 6 FCC Rcd 6834, 6835 P 9 (1991).* However, that precedent was not statutorily compelled. Moreover, while we have consistently rejected curative amendments in cellular cases where the applicable rule or statute remained in effect, such cases do not, in our view, require the dismissal of a pending application for failure to comply with a statutory provision that is no longer in effect. Given the elimination of section 310(b)'s prohibition against common carrier licensees having alien officers or directors and corresponding changes in our policies regarding alien general partners, we discern no public interest rationale for pursuing the question of whether EJM's application, by virtue of Mr. Vu's interest in W.L. Communications, violated the prior prohibition against cellular licensees having an alien general partner or a noninsulated limited partner.

B. LACK OF CANDOR

57. Having concluded that the public interest would not be served by revoking Alee's licensee for its initial section 310(b) violation, we must review the ALJ's finding that Alee lacked candor concerning this matter. Given its resolution of the MCRSA and alien ownership issues, the Board had no occasion to consider this issue. Based upon our independent review of the record and the exceptions, we find that a preponderance of the evidence supports the ALJ's findings, and that Alee's evident lack of candor mandates revocation of its license.

58. Alee is a general partnership with fourteen partners. It was organized and initially managed by TCC broker, Allan Kane. (As noted in P 2 above, TCC prepared the cellular applications at issue in this proceeding.) Kane has no ownership interest in Alee, but his former son-in-law, Robert Bernstein, is Alee's signing partner and largest equity holder. In a letter dated April 30, 1990, Alee advised the Commission that its initial RSA applications, filed on August 12, 1988, included a four percent alien general partner Shafi M. Sharifan, but that his partnership interest was transferred to Amir R. Riahi-Shiraz (a U.S. citizen) on September 23, 1988. After winning the lottery in December 1988, Alee filed a section 1.65 amendment on January 9, 1989. That amendment, signed by Bernstein and prepared by Alee's attorney, William Franklin, listed Sharifan (not Riahi-Shiraz) as a partner and inaccurately stated that all the partners were U.S. citizens. Alee's applications for Tiers 1 and 2, filed on August 12, 1988, list Shafi M. Sharifan as a partner, whereas the later filed applications for Tiers 3 through 5 list Amir R. Riahi-Shiraz as a partner. Bernstein signed all of Alee's applications.

59. This led the Bureau to specify an issue to determine if Alee lacked candor in failing to reveal that it had an alien general partner or that there had been a change in its ownership structure. *6 FCC Rcd at 2928, 2931 P43 & n.24.*

After an evidentiary hearing, the ALJ determined that Alee, aware of its initial section 310(b)(3) violation, knowingly "fomented a cover-up" and engaged in "[a] deceit, pure and simple." *Initial Decision, 7 FCC Rcd at 8705 P 199.*

60. **Initial Decision**: In concluding that Alee's January 9, 1989 amendment was deliberately false, the ALJ focused on Alee's first partnership meeting held on December 19, 1988, at which the alien ownership problem was discussed. Faced with conflicting testimony as to the extent of that discussion, the ALJ credited the testimony of William Franklin, who participated in the meeting by speakerphone. Franklin testified that the partners had agreed to continue to rely on Shafi Sharifan as a partner and on the original questionnaire erroneously listing him as a U.S. citizen. The ALJ found, based on demeanor observations, that the partners who testified "were perfectly willing, indeed anxious, to bend the truth and/or outright lie . . . [and] to find a scapegoat (with money of course) that they could blame for their own shortcomings." *7 FCC Rcd 8747 P 9 & n.159* (Conc.) The ALJ made no formal demeanor findings concerning Allan Kane. Id. at 8699 PP 109-10. He nevertheless discredited as "bordering on the incredible," *id. at 8704* n.P 178 & n.48, Kane's testimony that he had never decided in his own mind whether Sharifan was an alien.

61. In finding an intentional lack of candor, the ALJ also cited: (1) Franklin's subsequent letter to Bernstein accompanying the draft 1.65 amendment that expressly referred to the partnership's December 19, 1988 decision to retain the identification of Sharifan as an Alee partner, id. at *8705 P 191;* (2) a discrepancy between the partners listed on the Tiers 1-2 applications and on the Tier 3 applications, all of which Bernstein had signed and certified as accurate, *id. at P 192;* and (3) Sharifan's subsequent receipt and payment of capital calls, attendance at partnership meetings, and signature on partnership documents (including the January 3,

1990 rescission of the MCRSA) id. at 8704-05 PP 189, 193. Additionally, the ALJ found "passing strange" the claim that none of the partners knew each other and thus had no idea which of only fourteen partners was the alien. *Id. at P 193 & n.53.* He also noted Bernstein's testimony that he remembered meeting Sharifan at one or two partnership meetings. Id. Accordingly, the ALJ concluded that, despite having information to the contrary, Alee decided at that meeting to rely on Sharifan's original questionnaire reflecting that he was a United States citizen. Id. at 8704 PP 183-88.

62. **Exceptions**: Citing *Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983),* Alee urges that, as a matter of law, there was no lack of candor because it did not intend to deceive the Commission when it filed the section 1.65 amendment erroneously identifying Sharifan as a partner and certifying that all partners were United States citizens.[3] It categorically denies ever agreeing to conceal Sharifan's citizenship from the Commission. It faults the ALJ for imputing to Alee the knowledge of TCC representatives Allan Kane and Kent Malecki, who discovered that Sharifan was an alien and arranged for the transfer of his partnership interest to Riahi. Alee concedes that the partners learned at the December 19 meeting that there had been an alien partner initially, but that he had been replaced by a U.S. citizen. It claims, however, that neither the alien partner (Sharifan) nor his successor (Riahi) was identified by name at the December 19th meeting, that none of the partners had ever met the alien partner, and that the alien partner did not attend that first partnership meeting. It claims further that Kane and Franklin

[3] Alee also excepts to the ALJ's conclusion *(7 FCC Rcd at 8705 P 198)* that an independent basis for revoking Alee is that it abdicated responsibility to TCC broker Allan Kane. However, no such issue was ever designated against Alee. The Board properly granted the exception on that narrow ground without pursuing it further. *9 FCC Rcd 5150 P 85.* And, given our disqualification of Alee for lack of candor, we need not address Alee's exception concerning Kandace Dolphin.

assured the partners attending the meeting that this matter had been satisfactorily resolved. Accordingly, Alee claims that when Bernstein signed the January 9, 1989 amendment erroneously listing Sharifan (rather than Riahi) as a partner and erroneously certifying that all of the partners were U.S. citizens, none of Alee's partners, including Bernstein, knew, or had reason to know, that Sharifan was no longer a partner or that he was an alien.

63. Since Bernstein understood from the meeting that the alien problem had been taken care of and since he did not know the name of the former alien partner or that the transfer was contrary to the rules, Alee maintains that he had no reason to question the accuracy of the list of partners in the draft section 1.65 amendment prepared by Franklin. According to Alee, it was reasonable for Bernstein to rely on Franklin to apprise him of the Commission's disclosure requirements and to provide him with the correct information to meet those disclosure requirements. It deems such reliance to be particularly appropriate given the hiring of Franklin to serve as Alee's communications counsel and Franklin's service as TCC's counsel when Alee's application was prepared and filed.

64. Alee also claims that Franklin's testimony is riddled with inconsistencies, and that his version of what occurred at the meeting (i.e., that he offered several alternatives, and that the partners chose to rely on the original questionnaire (erroneously) identifying Sharifan as a U.S. citizen) is not corroborated by any of the partners who attended that meeting. For example, handwritten notes on Franklin's copy of Alee's ownership exhibit, which Kane faxed to him on December 13 (i.e., before December 19th partnership meeting), suggested that Franklin knew, and actually focused on, the substitution of Riahi for Sharifan starting with the Tier 3 applications. (CCB Ex. 6). Nevertheless, Franklin testified that at the time of the December 19, 1988 meeting

he was unaware of the September 23, 1988 transfer to Riahi. Alee also denies that Bernstein had any knowledge of the cover letter that accompanied the draft section 1.65 amendment, noting that Franklin sent the letter to Kane's, instead of Bernstein's, address, who did not show it to Bernstein.

65. Alee submits that the partners did not learn of the alien partner's identity until January 1990 when new counsel replaced Franklin. Upon being advised by successor counsel that Sharifan is the alien and that his inclusion on the list of partners contained in the January 9, 1989 amendment was erroneous, Alee immediately advised the Commission of the facts and requested a waiver of section 22.922 to permit the September 23, 1988 transfer of Sharifan's partnership interest to Mr. Riahi-Shiraz. Alee claims that this voluntary disclosure, which led the Bureau to specify the alien ownership and lack of candor issues, further belies [*8175] that there was an intent to deceive.

66. **Discussion**: As the Board found *(9 FCC Rcd at 5145 P 76),* the ALJ erroneously asserted that the burden of proof is on the licensees, and not on the Bureau, as is required by *47 U.S.C. § 312*(d). Accordingly, we have independently reviewed the record under the correct burden of proof. Based upon that review, we find that a preponderance of the evidence establishes that when Bernstein signed the amendment (1) he knew that having an alien partner would adversely affect the tentative selectee's chance of getting the construction permit; and (2) he knew that the information contained in the amendment was false. We therefore affirm the ALJ's determination that Alee lacked candor, and revoke Alee's license on this basis. In so doing, we need not rely on the considerable record evidence concerning Kane's complicity in this matter, inasmuch as the record establishes a sufficient likelihood of intentional concealment of relevant

information by Bernstein independently to support a finding that Alee lacked candor.

67. Candor is a fundamental duty of Commission applicants and licensees, on whose submissions the Commission must be able to rely for completeness and accuracy. *WOKO, Inc. v. FCC, 329 U.S. 223 (1946); RKO General v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981),* cert. denied, *456 U.S. 927* and *457 U.S. 1119 (1982).* A party's intent to deceive is an essential element of a finding of lack of candor. A finding of lack of candor therefore requires a showing that relevant information has been withheld; that the party in question knew the information was relevant, and that it intended to withhold that information. *Fox Television Stations, 10 FCC Rcd 8452, 8478 P 60 (1995),* pet for recon denied, *11 FCC Rcd 7773 (1996).* Relevant information is defined as that potentially having decisional significance. Because this is a revocation proceeding, the Bureau has the burden of proof, and each of these elements must be established by a preponderance of the evidence. *Silver Star Communications-Albany, Inc., 6 FCC Rcd 6905, 6906 P 18 & n.3 (1991).* This requires a showing that it is more likely than not that Alee was aware of the alien general partner, understood the relevance of this information, and deliberately withheld the facts from the Commission.

68. We turn first to the relevance of the citizenship of Shafi Sharifan, a four percent general partner in Alee. Prior to the adoption of the Telecom Act, see paragraph 54 above, and at the time of the events in question, section 310(b)(3) of the Communications Act and section 22.4(b)(3) of the rules expressly prohibited the grant of a common carrier radio license to a corporation with any alien officer or director, and the Commission had treated the position of a general partner as being comparable to that of a corporate officer or director. *Wilner and Scheiner, 103 FCC 2d at 520 P 16 & n.43.* In addition, strict rules that govern the processing of cellular

applications provide that the inclusion of an alien general partner is a major defect that cannot be corrected by amendment. *Continental Cellular, 6 FCC Rcd 6834, 6835 P 9 (1991),* aff'd sub nom. *Moving Phones Partnership v. FCC, 998 F.2d 1051 (D.C. Cir. 1993).* Accord *Cellwave Telephone Services v. FCC, 30 F.3d 1533 (D.C. Cir. 1994); Sacramento RSA Limited Partnership, 9 FCC Rcd 3182 (1994),* aff'd sub nom. *Sacramento RSA Limited Partnership v. FCC, 56 F.3d 1551 (D.C. Cir. 1995).* Thus, as the ALJ noted *(7 FCC Rcd at 8750 P 22),* if Alee had advised the Commission on January 9, 1989 that one of its initial general partners was an alien, the Commission would have summarily dismissed its application pursuant to 47 C.F.R. § 22.20 of the Rules.

69. According to Alee, it did not intend to deceive the Commission when it filed the erroneous section 1.65 amendment listing Sharifan as a general partner and representing that all its partners were U.S. citizens. Alee's signing partner claims to have relied on the assurance of its attorney, William Franklin, and of its initial manager, Allan Kane, that although Alee initially had an alien partner, the matter had been taken care of, but this claim is not credible nor supported by the record. A preponderance of the evidence establishes that Alee, understanding that this was a matter that could adversely affect the grant of the construction permit, intentionally concealed the presence of the alien partner.

70. First, a preponderance of the evidence reflects that Bernstein understood the significance of Sharifan's alien status when he signed the section 1.65 amendment. He testified that he knew at the time of the December 19 meeting, when he first learned of the alien partner, that "this was a serious matter," that applicants are forbidden to have alien partners, and that this could invalidate Alee's cellular application. (Tr. 5903, 5907). He was aware of the

seriousness of this matter from earlier conversations with Kane, in which Kane recounted the difficulties of other partnerships that had inadvertently filed with an alien. (Tr. 5907). He was therefore relieved by Franklin's explanation that the matter had been taken care of through a substitution of a non-alien. (Tr. 5904). Partners Becky Jo Clark and Terry Jones, who served with Bernstein on Alee's executive committee, likewise understood the significance of this information. Both attended the initial partnership meeting on December 19, 1988. Clark, in particular, was very upset, furious in fact, when she learned that there had been an alien and tremendously relieved by Franklin's explanation that the substitution took care of the matter. (Tr. 6365, 6545, 6434).

71. Alee cites testimony that Franklin did not advise Alee about the Commission's policies concerning misrepresentation and lack of candor. (Tr. 2637). That applicants have a fundamental duty to be candid with the Commission that is breached by withholding relevant information is not a technical issue requiring the expertise of communications counsel. The record in this case, as detailed by the ALJ and as discussed below, reflects that Alee, aware that it had an alien partner, filed an amendment representing that all of its partners were United States citizens. Whether it did so on the advice of counsel, or on its own initiative, and whether it understood the precise legal consequences of reporting false information (i.e., that lack of candor is absolutely disqualifying), Alee did not need to consult an attorney, let alone communications counsel, in order to appreciate that information filed with a federal agency should be truthful. Alee's reliance on Fox Television Stations is misplaced. That case is clearly distinguishable because it involved a technical issue concerning the relevance of equity contributions in assessing compliance with section 310(b). Failure to report such information did not constitute a lack of candor where the licensee could not determine, based upon published cases, that the information was

material, and where the licensee had relied in good faith reliance on erroneous, but not inherently implausible, advice of counsel on that issue. *10 FCC Rcd at 8500*-01 PP 118-19. The test is whether a reasonable person could, and whether the party in question actually did, understand the impropriety of withholding the information. Id. at P 119 & n.67; *Stereo Broadcasters Inc., 87 FCC 2d 87, 103 (1981); WADECO, 628 F.2d 122, 127 (D.C. Cir. 1980); Pontchartrain Broadcasting Company, 7 FCC Rcd 3264 (Rev. Bd. 1992),* review denied, *8 FCC Rcd 2256 (1993),* aff'd, *15 F.3d 183 (D.C. Cir. 1994).* There is, however, nothing esoteric or complicated about a tentative selectee's duty of candor with respect to information that is clearly known to, or readily ascertainable by the tentative selectee.[4]

72. Here, the record is clear that Bernstein, in addition to appreciating the significance of the alien matter, knew when he signed the amendment that he was certifying the truthfulness of the information contained therein. The likelihood that Bernstein knew when he signed the erroneous section 1.65 amendment that the facts contained therein were false is also established by a preponderance of the evidence. The amendment that Bernstein signed in January 1989 was very short. It represented on its face that "none of these changes make any change to the partnership," and that "there is no change in the ownership previously identified in the application." (CCB Ex. 10, p.3). Even assuming Bernstein did not know the names of the partners, he would have realized something was wrong when he read the amendment.

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[4] There is no merit to the further contention that, because Franklin represents TCC, Alee was entitled to rely on Franklin to supply an accurate, up-to-date list of partners to be reported to the Commission in the section 1.65 amendment. Who has a partnership interest is not a complicated legal question requiring the expertise of an experienced communications attorney. That Franklin did not represent Alee when it filed its application makes it even less reasonable that Bernstein would rely on Franklin to supply accurate ownership information.

If, as Bernstein claims, he was told that the alien problem was "fixed" by substituting a new non-alien partner, signing an amendment stating that there was no change in Alee's ownership should have given him pause. And, if Bernstein compared the names on the amendment with those on the partnership agreement, he would have discovered that the names matched. This would have alerted him to the fact that, despite the ownership change supposedly effected to "fix" the alien problem, the amendment included the name of the original alien partner (rather than the substitute partner). At that point, he would have also realized that the amendment's representation concerning the partners' citizenship was wrong. Not only was Bernstein aware of the seriousness of alien matter, he testified that he understood that in signing the amendment he was certifying the accuracy and truthfulness of the information contained therein. (Tr. 5972, 5973). Under these circumstances, it is simply not credible that, apprised at the December 20 partnership meeting that the alien problem was "taken care of" by replacing the alien partner (Tr. 5904-05), he would have signed an amendment less than one month later that states there is no change in ownership without focusing on the alien matter or on the ownership change effected by the substitution. (Tr. 5972). It is also incredible that Bernstein, aware from his earlier discussions with Kane that an alien partner could invalidate Alee's application, never talked to Kane about the alien problem after the December 19th meeting (Tr. 5918), or inquired as to the identity of the alien (Tr. 5910).

73. Nothing in the record, other than the testimony of Alee partners Becky Jo Clark and Terry Jones, corroborates Bernstein's self-serving version of what occurred at the December 19th meeting. We are not inclined to reject the contrary testimony of William Franklin simply because all three partners testified that Kane and/or Franklin advised them at the meeting that the alien problem was taken care of.

Franklin testified that the partners decided at the December 19, 1988 meeting to retain the identification of Sharifan as a partner based on the questionnaire reflecting that he is a U.S. citizen. (Tr. 2543-44, 2555-57). In evaluating the credibility of Franklin vis-a-vis that of Alee's three testifying partners, a motive to misrepresent what course was agreed to at the December 19 meeting is clear only with respect to the partners, all of whom understood that the presence of an alien partner was a serious matter. In contrast, it is unclear what motive Franklin, who had no financial interest in Alee and had just been retained to represent Alee, would have had to misrepresent the partners' decision regarding the alien matter. Since Franklin was not counsel for Alee when it filed its application, he was in no way responsible for the initial inclusion of an alien general partner. Thus, it is not apparent what motive he would have had to conceal the true nature of the alien problem from the partners or to keep them in the dark as to how the alien problem was resolved.

74. We are not persuaded by Alee's attempt to impeach Franklin's credibility on the ground that his testimony is internally inconsistent. There is, as Alee points out, some ambiguity in his testimony as to whether he was aware of the Sharifan-Riahi transfer or of Sharifan's actual citizenship status when he prepared the section 1.65 amendment. As Pepper and Corazzini notes, however, Franklin's awareness that the later tier applications "listed" Riahi as a partner does not establish actual knowledge of the Sharifan-Riahi transfer. This is confirmed by Franklin's testimony that, although he was told that Riahi was listed on the later applications, he was not told that Sharifan's partnership share was transferred to Riahi or apprised of the circumstances surrounding the listing of Riahi on the later applications. (Tr. 2552-53). He explained further that, in light of the partnership's decision to retain the identification of Sharifan as a partner, he did not feel obliged to check out the rumor that he was an alien. (Tr. 2555). Whether Franklin knew that Sharifan was an alien or

had only heard a rumor to that effect does not impact on his testimony as to what occurred at that partnership meeting regarding the alien matter. In any event, the questionable nature of certain discrete portions of Franklin's testimony would not require that we reject his entire testimony. *Dorothy O. Schulze and Deborah Brigham, 8 FCC Rcd 442,* 444 PP 21-24 (1993), citing *United States v. Interstate Engineering Corp., 288 F. Supp. 4 02, 415 (D. N.H. 1967).*

75. In this regard, a host of documentary evidence supports Franklin's testimony. First, there is Franklin's December 28, 1988 letter to Bernstein that accompanied the draft section 1.65 amendment. The letter states: "per the partnership's decision at its December 19 meeting we have retained Mr. Sharifan's identification as a partner." The letter also reflects that the partnership had discussed the risk of dismissal for subsequent applications but that "on balance this alternative minimizes risk to Alee." (CCB Ex. 10). The latter suggests that other risks not specifically mentioned in the letter were deemed "on balance" to pose the greater obstacle to Alee's receiving the license. The record reflects that, as Alee claims, the letter was sent to Kane's office rather than to Bernstein directly. Although Kane does not recall forwarding the letter to Bernstein, he confirmed that he had instructed Franklin to send Bernstein's mail to Kane's office and that he routinely forwarded such mail to Bernstein. (Tr. 3480-81). Given Kane's practice of routinely forwarding such letters to Bernstein, the Franklin letter, apparently written with the expectation that Bernstein would receive it, is probative of what occurred at that first partnership meeting even if Bernstein never saw the letter. In this regard, Alee had retained Franklin as its communications counsel by the time of the December 19th meeting. (CCB Ex. 61; Tr. 2548-49). It is unclear why Franklin would have written such a letter if, as Alee claims, the partners never agreed to retain the identification of Sharifan as a partner.

76. Second, although the partners' testimony is clear that each learned of an alien partner at the December 19 meeting, the minutes of that meeting reflect only a discussion of "confidential matters." (AALA/CFL Ex. 89). Mrs. Clark, concerned that the minutes should accurately record what transpired at the meeting, suggested three changes to the minutes. Yet, she saw no reason that the minutes specifically reflect the discussion of the alien matter. (Tr. 6534-35). If, as all three partners testified, Kane and Franklin advised them that substituting the non-alien partner took care of this matter, there would have been no reason for such secrecy. Similarly, a follow-up letter from Kane, while referring to "confidential matters," states that "all of you in Alee are in the greatest and yet the damnedest position imaginable." (CCB Ex. 116). Kane admitted that he was talking in code. (Tr. 3479). He gave deposition testimony that this referred to the alien matter but he testified at the hearing that this referred instead to the risk-sharing agreement. (Tr. 3479, 3564). Bernstein understood that this referred to the alien matter. (Tr. 5910).

77. Third, the notes of a telephone conversation between Kane and Franklin reflect that they discussed how to present Alee's alien problem at the December 19, 1988 partnership meeting. The notes reflect that Franklin stressed that the damage had been done, and recommended that, with the agreement of the other partners, Alee should leave Sharifan in the partnership and hope that no one discovered the alien. He advised that the real risk would be a second win to Alee, which would increase the odds of someone discovering the alien and filing a petition to deny on that basis. (Tr. 3470; CCB Ex. 7). Kane testified that, as the notes reflect, Franklin's advice was to lay it all out at the partnership meeting, get a vote on it, and disclose exactly what the situation was. (Tr. 3472). Franklin has no specific recollection of this conversation (tr. 2629-30), but he testified that if Kane had told him that there was some doubt

as to Sharifan's citizenship this is precisely what he would have advised. (Tr. 2631-32).

78. In addition to documentary evidence belying the partners' self-serving testimony, the ALJ, based upon his observations as to their demeanor, made adverse credibility findings as to all three Alee partners. Specifically, he concluded that, with certain exceptions not applicable here, the partners testifying on behalf of the applicants or licensees involved in this consolidated proceeding were "perfectly willing, indeed anxious, to bend the truth and/or lie outright . . . . [and] to find a scapegoat (with money of course) that they could blame their troubles on." *7 FCC Rcd at 8747 P 9* (Conc.) As to testifying partner Becky Jo Clark, the ALJ stated, *7 FCC Rcd at 8719 n.64,* "put in its most charitable light her testimony was less than persuasive." We find no basis to disregard these findings, which are entitled to decisional deference unless those findings irreconcilably conflict with the record evidence. *WHW Enterprises v. FCC, 753 F.2d 1132 (D.C. Cir. 1985).* We recognize that these findings do not single out Alee's three testifying partners. We deem it significant, however, that the ALJ made these credibility findings in the context of the partnerships' efforts to blame all of their legal troubles on Franklin. This, of course, is precisely the defense that Alee has invoked here. And, as reflected above, the ALJ's credibility findings are not in conflict with the record evidence.

79. Finally, we are unimpressed by Alee's "voluntary" reporting of this matter to the Commission in its April 30, 1990 letter to the FCC Secretary. There, Alee reported that it had initially had an alien, whose partnership interest was transferred prior to the September 23, 1988 lottery. Alee is correct that it was the April 30, 1990 letter, rather than any independent investigation by the Bureau that led to the specification of lack of candor and alien ownership issues against Alee. However, Alee delayed reporting this matter

until after grant of the construction permit. This meant that instead of dismissing Alee's application the Commission had to institute revocation proceedings. Moreover, even assuming that Alee did not discover the errors in its amendment until early 1990, it delayed almost four months in advising the Commission of this matter, and even then it failed to make a full disclosure. It did not disclose that Sharifan had continued to participate in partnership matters following the December 19, 1988 meeting by paying capital calls and attending partnership meetings. Bernstein testified that he was unaware of Sharifan's continued participation until after Alee retained new counsel in January 1990. Nevertheless, Bernstein testified that he remembered meeting Sharifan at one or two partnership meetings. Even more troublesome is Bernstein's explanation as to why Alee did not disclose Sharifan's continued involvement in partnership affairs in its April 1990 letter. Bernstein claims that he thought there was a second alien, but the letter says nothing about a second alien. The failure to fully disclose the facts involving Sharifan's participation in Alee in a timely manner, together with Bernstein's dubious testimony on this matter, significantly undercuts the claim that the "voluntary" reporting of these matters belies any intent to deceive the Commission.

C. OWNERSHIP QUESTIONS

80. **Bravo**: The ALJ identified various discrepancies in Bravo's application, its direct case, and other documentary evidence as to the number, identity, and ownership interests of Bravo's partners. *7 FCC Rcd at 8738 PP 606-09.* He also found that Bravo had not provided complete ownership information for eight of the partners listed in its application. *7 FCC Rcd at 8737 P 600 & nn. 133-35.* Based on these findings, the ALJ determined that somewhere along the way Bravo misrepresented its ownership structure and effectuated

a post-filing transfer. Id. at 8738 PP 606, 608. In its exceptions, Bravo contends that its only representation of its ownership was contained in its application, and that there is no evidence that that representation was incorrect or that its initial ownership has changed.

81. We find that, apart from its failure to provide complete ownership lists for certain partnerships that hold partnership interests in Bravo, Bravo has adequately explained the irregularities noted by the ALJ, and that it is appropriate to permit Bravo to file a clarifying amendment setting forth this information. In this regard, there is merit to the claim that some of the irregularities noted by the ALJ were due to his reliance on documents obtained during discovery that were not necessarily indicative of Bravo's ownership structure. To the extent that Bravo failed to provide complete ownership information, such omissions, while numerous and the result of evident carelessness in preparing the ownership exhibit, are nevertheless minor and do not render Bravo's application substantially incomplete or otherwise unacceptable for filing. See *Cagal Cellular Communications Corp., 6 FCC Rcd 2285, 287-88 P 15 (1991),* aff'd sub nom. *Singleton v. FCC, 952 F.2d 1444 (D.C. Cir. 1992)* (carelessness in preparing application does not present a prima facie case for denying application); 47 C.F.R. § 22.128(d). We will therefore allow Bravo to file a clarifying amendment and will remand Bravo's application to the Bureau with instructions to review such amendment in accordance with its usual application procedures.

82. **EJM and Centaur**: By Memorandum Opinion and Order, FCC 91M-3487 (rel. Dec. 23, 1991), the ALJ summarily refused to add section 22.921(b) issues against applicants EJM and Centaur based upon the fact that Ida and Joseph Washington, by operation of Louisiana's community property statute, may each have an ownership interest in each others' competing cellular applications. We affirm that

ruling, but remand both applications to the Bureau for expedited consideration of the affidavits described below.

83. Ordinarily ownership interests held by spouses (or other family members) do not contravene section 22.921(b) in the absence of a showing of an actual ownership interest in, or potential to exercise control over, the licensed facility. See *Corporate Telecom, 55 F.3d at 678,* citing *Nancy Naleszkiewicz, 5 FCC Rcd 7131, 7137 P 51 (CCB 1990)* (recognizing that in contrast to the nearly conclusive presumption in effect from 1976 to 1992 that one spouse's broadcast/cable interests should be attributed to the other under § 73.3555 and § 76.501, the Commission never applied such a presumption in evaluating lottery applications under section 22.921(c)). We have not previously considered whether the prohibition against having more than one application for the same cellular market is violated if one spouse, solely by operation of a community property statute, has an interest in the other's cellular application. On that novel question of law, we do not find that the concerns underlying section 22.921(b) require that we interpret ownership within the meaning of that rule to encompass an interest derived solely from operation of a community property statute. We nevertheless find that it is appropriate to require that EJM and Centaur reaffirm their certifications pursuant to § 22.923(b)(7) that "the applicant is the real party in interest in this application." To that end, EJM and Centaur should submit affidavits from Joseph and Ida Washington certifying that: (1) each has taken whatever steps are necessary under Louisiana's community property statute to rebut the statutory presumption that their respective interests in EJM and in Centaur are community property; (2) each intends to treat his/her partnership interest as separate property rather than community property; and (3) each relinquishes any property right vested by state law in the other spouse's partnership interest.

84. In so holding, we note that there is no Commission precedent for interpreting our multiple ownership rules to encompass ownership interests that are derived solely from the operation of community property statutes. Even in the broadcast context, where we only recently eliminated the spousal attribution presumption, we have not constructively attributed media interests in a spousal relationship based solely on community property law. See *Richard P. Bott II, 4 FCC Rcd 4924, 4930 n.10 (Rev. Bd. 1989),* review denied, *5 FCC Rcd 2508 (1990),* aff'd sub nom. *Radio Representatives v. FCC, 926 F.2d 1215 (D.C. Cir. 1991)* (the Review Board declined to treat spouses in a community property state as 50% owners for purposes of the integration of ownership into management criteria, noting that the multiple ownership rules do not constructively attribute media ownership interests to spouses based solely on community property laws).

85. Moreover, as set forth in paragraph 26 above, section 22.921(b) was adopted in the context of the lottery and for the express purpose of discouraging multiple filings by applicants seeking only to increase their chances of selection by lottery. *98 FCC 2d at 218.* We subsequently declined the suggestion that we prohibit applicants who are related from filing for the same RSA market as a means of reducing the number of speculative filings. *Third Report and Order, 4 FCC Rcd at 2442 P 21.* We concluded that the integrity of the lottery process was adequately protected by requiring certification that the applicant is the real-party-in-interest in the application. In doing so, we cited *Virginia Communications, 2 FCC Rcd 1895 (1987).* That case involved MMDS licenses which, like cellular licenses, are chosen by lottery and are subject to similar ownership and real-party-in-interest rules. Id. at P 2. An MMDS applicant had certified that she was the real-party-in-interest in the application without disclosing that her husband had a vested interest in the application derived from Arizona's community

property statute. The Commission found a technical violation of the real-party-in-interest rules, and required that applicant to certify both that the husband relinquished all rights in any authorizations acquired by the wife and that any authorizations acquired by the wife are owned exclusively by her. From a regulatory standpoint, we deem it appropriate under the circumstances of this case to require a similar certification reaffirming that, notwithstanding any rights conferred by the community property statute, Ida and Joseph Washington do not have undisclosed interests in each others' cellular applications.

VI. SETTLEMENT AGREEMENTS

86. Petitioners have reached settlement agreements with Crystal, the licensee of the Oregon 1 RSA market, and with Alpha, the licensee of the Indiana 8 and the selectee for the Ohio 2 RSA markets. For the reasons set forth below, we conclude that the Crystal agreement and that portion of the Alpha agreement relating to the Indiana 8 RSA market are outside the scope of 47 C.F.R. § 22.129 and may be effectuated without Commission approval, but that the portion of the agreement relating to Alpha's pending application is subject to the provisions of section 22.129. However, because we cannot approve that portion of the agreement based upon the record before us, we will hold it in abeyance to permit further submissions by the parties.

87. Prior to the HDO, Petitioners (see P12 above) filed a Petition to Deny or Dismiss the pending applications and a Request for Institution of Revocation Proceedings against the licensees. While petitions for reconsideration of the Board's decision were pending before the Board, Petitioners entered into a settlement agreement with Crystal, the licensee for the Oregon 1 market. The Board concluded *(9 FCC Rcd at 6757 P 13)* that the agreement raised a policy question of first impression, and it certified the Joint Motion for Approval of the Settlement Agreement to the Commission. In particular,

the Board was concerned that the public interest questions raised in this proceeding would still require consideration despite the settlement agreement. Under the agreement, Petitioners would withdraw from further participation with respect to the Oregon 1 portion of the proceeding in exchange for partial reimbursement of their legitimate and prudent expenses, but they would continue to participate as to issues that are common to the Oregon 1 RSA market and to other unsettled applicant or licensee markets. While Applications for Review were pending before the Commission, Petitioners reached a similar agreement with Alpha, which is the selectee for the Ohio 2 market and the licensee for the Indiana 8 market.

88. In the Joint Motions for Approval of Settlement, the parties urge that neither Petitioners' agreement with Crystal nor their subsequent agreement with Alpha requires Commission approval. Petitioners point out that, having reached a settlement with only one of the above-captioned applicants, they are not withdrawing their petition to deny since that pleading related to all of the above-captioned applications. With respect to their agreements with the licensees of the Oregon 1 and Indiana 8 markets, Petitioners assert that section 22.129 does not apply to agreements to dismiss pleadings filed against licensees. Petitioners therefore assert that the agreements involving all three markets are beyond the scope of section 22.129. Alternatively, the parties to the settlement agreements seek a determination that approval of the agreements serves the public interest. The parties urge that there are unique and compelling circumstances that support approval of both the Crystal and the Alpha settlement agreements. In particular, they cite the complexity of the proceeding, as well as the fact that Alpha is the only applicant to dispute that it was a party to the MCRSAs. Additionally, they emphasize that, under the agreements, Petitioners will receive only a partial reimbursement of the substantial expenses legitimately and

prudently incurred in participating in the consolidated risk-sharing proceeding.

89. **Discussion**: In conjunction with a thorough rewrite of its cellular rules, the Commission codified settlement policies for cellular applicants in 47 C.F.R. § 22.129. See also Revision of Part 22 Rules, 9 FCC Rcd at 6549-50. Section 22.129 provides that "parties that have filed . . . a petition to deny, informal objection or other pleading against a pending applicant in the Public Mobile Services and then seek to withdraw or request dismissal of . . . the petition, either unilaterally or in exchange for a financial consideration, must obtain the approval of the FCC." (emphasis added) Authorizations were issued to Crystal for the Oregon 1 RSA market and to Alpha for the Indiana 8 RSA market, and Petitioners filed a pleading to revoke those authorizations. By virtue of their agreement with Crystal and that portion of their agreement with Alpha pertaining to the Indiana 8 market, Petitioners effectively seek partial dismissal of their petition to revoke the above-captioned licenses. As the language of section 22.129 is clearly limited to agreements to dismiss or withdraw pleadings against a pending applicant, Commission approval is not required for agreements to withdraw or dismiss pleadings filed against a licensee.

90. We find, however, that Commission approval is required for Petitioners' agreement to withdraw from further participation, either before the Commission or the United States Court of Appeals for the District of Columbia Circuit, in those issues relating exclusively to Alpha's pending application for the Ohio 2 RSA market. We are not persuaded by the parties' assertion that the settlement agreement involving Alpha's pending application is outside the scope of section 22.129 because Petitioners filed a single petition to deny all pending applications. That Petitioners have reached a settlement with only one of the pending

applicants does not exempt them from the payment limitations of section 22.129. There is nothing in the plain language of the rule or its underlying rationale to support such an interpretation. Accordingly, we conclude that Commission approval is required for Petitioners' agreement to withdraw its objection to Alpha's pending application even though they have not reached settlement agreements with the other pending applicants.

91. Turning to the public interest question raised by the Board, it is correct that the Commission has generally disfavored settlements in which petitioners to deny, having raised issues of public interest significance, seek reimbursement for their expenses before those questions have been resolved. However, the thrust of our concern has been avoiding coercive tactics, particularly where the petitioner has raised issues affecting the public interest, and then is paid to withdraw, leaving those allegations unadjudicated. See *Tidewater Radio, Inc., 24 RR 653 (1962).* We are persuaded that the Ohio 2 settlement agreement will not encourage the filing of abusive petitions to deny designed to secure the payment of money. Petitioners have vigorously participated in this proceeding and their proposed withdrawal comes only after the development of a full hearing record. By participating in every phase of this complex, multi-party, multi-market proceeding, Petitioners have made a substantial contribution to the adjudication of matters affecting the public interest, and have pledged to continue their efforts except for those issues that relate exclusively to Alpha's pending application. Consistent with that pledge, Petitioners filed extensive pleadings in response to the pending Applications for Review. Moreover, due to the unprecedented number of markets and parties involved, the litigation expenses have been enormous, making partial reimbursement particularly appropriate. Under these circumstances, we deem Petitioners' substantial, non-

frivolous participation at every stage of this proceeding to be analogous to that of private attorney generals.

92. Notwithstanding the clear public interest benefits of permitting piecemeal settlements in this multi-party, multi-market proceeding, we cannot approve the settlement agreement based upon the record before us. In accordance with the requirements of section 22.129 of the rules, Petitioners have submitted a copy of the Alpha settlement agreement, as well as declarations from each individual petitioner. The declarations state that the settlement agreement sets forth the exact nature and amount of any and all consideration received or promised in connection with resolution of the disputes being settled. Each petitioner has also certified that its share of the settlement proceeds does not exceed its legitimate and prudent out-of-pocket expenses in the consolidated risk-sharing proceeding.

93. Having agreed to settle their disputes with only one RSA applicant involved in the consolidated risk-sharing proceeding, however, Petitioners are entitled to only that fraction of their total expenses in the consolidated proceeding relating to the RSA applications that is attributable to the dispute involving Alpha's application. Although the Joint Motion states that Petitioners have incurred legal fees in excess of $ 2 million in the course of the consolidated proceeding initially involving 18 pending applicants and 9 licensees, they have agreed to settle their disputes in the Ohio 2 RSA market in exchange for a payment of $ 250,000. In the absence of certification by each Petitioner that its share of this amount does not exceed its legitimate and prudent expenses for the one applicant market involved, we cannot approve this portion of the Alpha settlement agreement. Our concern is that, as a result of a series of such agreements with the applicants, Petitioners may ultimately recover more than their legitimate and prudent expenses in the connection with their petition to

deny or dismiss the above-captioned RSA applications. This would violate section 22.129 of the rules and disserve the public interest.

94. For this reason, we will hold the settlement agreement for the Ohio 2 market in abeyance pending the submission of declarations from each individual petitioner certifying that its share of the Ohio 2 payment does not exceed its legitimate and prudent expenses with respect to the dispute involving that one market. We will accord Petitioners considerable flexibility in meeting this requirement. Each Petitioner may, for example, calculate its expenses for the Ohio 2 market as a proportion of the total expenses legitimately and prudently incurred in filing and prosecuting the petition to deny or dismiss the pending RSA applications. Alternatively, each petitioner may calculate such expenses based upon those factors asserted to be unique to the disputes involved in the Ohio 2 RSA market. Petitioners' request for reimbursement of expenses should be supported by statements demonstrating attorney's fees in accordance with *Reevaluation of Standards for Professionals Seeking Reimbursement Pursuant to Rule 73.3525, 86 FCC 2d 1047, 1048 P 3 (1982),* and by an itemized accounting of any other expenses, as is required by section 22.129(a)(3). Finally, pursuant to section 22.129(b), the parties must also submit an affidavit from Alpha certifying that it has not paid, and will not pay, any money or other consideration in excess of Petitioners' legitimate and prudent expenses in exchange for their promise to withdraw the objections to the grant of Alpha's Ohio 2 RSA application. To expedite consideration of this matter, the General Counsel may make a determination in accordance with its delegation of authority as to the adequacy of the parties' further submissions and either approve or disapprove the Ohio 2 portion of the Alpha agreement on that basis.

VII. ORDERING CLAUSES

95. ACCORDINGLY, IT IS ORDERED That the Motion for Leave to File Partial Reply, filed on February 15, 1995 by Pepper & Corazzini, and the Motion for Leave to File a Limited Reply, filed on February 17, 1995 by The Partnerships ARE GRANTED; and that the Partial Reply to Petitioners' Opposition to Applications for Review, submitted for filing on February 15, 1995 by Pepper & Corazzini, and the Limited Reply to Petitioners' Consolidated Opposition to Applications for Review, filed on February 17, 1995 by The Partnerships ARE ACCEPTED.[5]

96. IT IS FURTHER ORDERED That, pursuant to 47 C.F.R. § 1.115(g) of the Commission's Rules,

> (a) the following Applications for Review ARE GRANTED in part and DENIED in part: (i) separate Applications for Review filed on December 19, 1994 by Algreg Cellular, Alpha Cellular, Data Cellular Systems, Crystal Communication Systems, Signal Cellular Communications, Satellite Cellular Systems, Cellular Pacific, North American Cellular, and the law firm of Pepper & Corazzini; (ii) a single Application for Review, filed December 19, 1994 on behalf of The Partnerships [Jaybar Communications, Pinellas Communications, Centaur Partnership, Bay Cellular, EJM Cellular

[5] We will accept Pepper & Corazzini's Partial Reply and The Partnerships' Limited Reply to the extent that they seek to respond to an argument that Petitioners raised for the first time in Opposition to the Applications for Review. At issue is the time for appealing the HDO's ruling that the Agreements violate the RSA rules, a ruling that the Board deemed to be beyond its jurisdiction but subject to appeal to the Commission. Had Petitioners sought Commission review of that Board conclusion, Pepper & Corazzini would have had an opportunity to respond.

Partners, Cranford Cellular Communications, A-1 Cellular Communications, Cel-Tel Communications, and Alee Cellular Communications]; and (iii) a single Application for Review, filed December 19, 1994 by Bravo Cellular and Florida Cellular;

(b) the Application for Review, filed on December 16, 1994 by Miller Communications and Skywave Partners, Inc. IS DENIED;[6] and

(c) the *Memorandum Opinion and Order Designating Applications for Hearing and Order to Show Cause, 6 FCC Rcd 2921 (Com. Car. Bur. 1991), Algreg Cellular Engineering, 7 FCC Rcd 8686 (ALJ 1992),* and *Algreg Cellular Engineering, 9 FCC Rcd 5098 (Rev. Bd. 1994),* recon. denied, *9 FCC Rcd 6753 (Rev. Bd. 1994),* ARE SET ASIDE to the extent reflected herein.

97. IT IS FURTHER ORDERED That the following pleadings ARE DISMISSED: (a) Joint Request for Official Notice, filed on June 2, 1995 by Algreg Cellular and Satellite Cellular Systems; (b) Motion for Leave to Amend Application for Review, filed on June 5, 1995 by Crystal Communications Systems; (c) Motion for Leave to File Supplement to the Application for Review, filed on June 6, 1995 by The Partnerships; (d) Joint Request for Official Notice, filed on June 14, 1995 by Cellular Pacific, Data Cellular Systems, North American Cellular, and Signal Cellular Communications; (e) Motion for Leave to File Request for Official Notice, filed on June 16, 1995 by Alpha

[6] The only matter raised in this Application for Review concerns the Board's rescission of forfeitures imposed by the ALJ based on his findings that certain licensees had abused the Commission's processes. See paragraph 51 above.

Cellular; (f) Supplements to Application for Review submitted for filing on June 5, 1995 by Crystal, on June 6, 1995 by The Partnerships, and on June 16, 1995 by Alpha; and (g) Erratum to Supplement submitted for filing on June 13, 1995 by the Partnerships.[7]

98. IT IS FURTHER ORDERED That the following pleadings ARE DISMISSED: (a) Joint Request for Official Notice, filed on March 13, 1997 by Algreg Cellular and Satellite Cellular Systems; (b) Response to Joint Request for Official Notice and Second Supplement to Application for Review, filed on March 24, 1997 by Crystal Communications Systems; (c) Motion to Accept Second Supplement to Application for Review, filed on March 24, 1997 by Crystal Communications Systems; (d) Motion for Leave to File Second Supplement to Application for Review, filed on March 27, 1997 by The Partnerships; (e) Second Supplement to the Application for Review, filed on March 27, 1997 by The Partnerships; (f) Motion to Accept Comments, filed on April 1, 1997 by Alpha Cellular; (g) Comments on the Second Supplement to Crystal Communications Systems' Application for Review, filed April 1, 1997 by Alpha Cellular; (h) Response to Motion for Leave to File Second Supplement to Application for Review and to Second Supplement to Application for Review, filed April 9, 1997 by Thomas Domencich and the Committee for Fair Lottery; (i) Motion to Accept Comments and Comments on Crystal Communications Systems' Second Supplement, filed on April 9, 1997 by Data Cellular Systems; (j) Motion to Accept Comments and Comments on Crystal Communications Systems' Second Supplement, filed on April 9, 1997 by Cellular Pacific; (k) Motion to Accept

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[7] These various pleadings and related supplements request that we take official notice of our decision in *Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995),* in connection with the MCRSA, reporting, and false certification issues. In view of our determinations herein concerning those issues, however, the request for official notice is moot.

Comments and Comments on Crystal Communications Systems' Second Supplement, filed on April 9, 1997 by North American Cellular; and (l) Motion to Accept Comments and Comments on Crystal Communications Systems' Second Supplement, filed on April 9, 1997 by Signal Cellular Communications.[8]

99. IT IS FURTHER ORDERED That the following applications ARE GRANTED: (a) A-1 Cellular Communications' applications for the Texas 10 (Navarro) RSA (File No. 10409-CL-P-661-A-89) and the Missouri 11 (Moniteau) RSA (File No. 10454-CL-P-514-A-89); (b) Cranford Cellular Communications' application for the Alabama 5 (Cleburne) RSA (File No. 10611-CL-P-311-A-89); (c) Cel-Tel Communications' application for the Ohio 5 (Hancock) RSA (File No. 10912-CL-P-589-A-89); (d) Algreg Cellular Engineering's application for the Alabama 1 (Franklin) RSA (File No. 10607-CL-P-307-A-89); (e) Pinellas Communications' application for the Pennsylvania 2 (McKean) RSA (File No. 10808-CL-P-613-A-89); (f) Florida Cellular's application for the Missouri 2 (Harrison) RSA (File No. 10445-CL-P-505-A-89); (g) Bay Cellular of Florida's application for the Mississippi 5 (Washington) RSA (File No. 10754-CL-P-497-A-89); and (h) Signal Cellular Communications' application for the South Carolina 8 (Hampton) RSA (File No. 10721-CL-P-632-A-89).

100. IT IS FURTHER ORDERED That the applications of EJM Cellular Partners for the Oklahoma 1 (Cimarron) RSA

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[8] The request for official notice and various related pleadings concern whether revoking the licenses and dismissing the applications for participation in the MCRSAs is consistent with recent Commission decisions, *PCS 2000, L.P. (Memorandum Opinion and Order), 12 FCC Rcd 1681 (1997), PCS 2000, L.P. (Notice of Apparent Liability and Forfeiture), 12 FCC Rcd 1703 (1997),* and *NextWave Personal Communications, Inc., 12 FCC Rcd 2030 (WTB 1997).* Given our resolution of the MCRSA issue herein, we need not consider the applicability of those recent decisions to this case.

(File No. 10567-CL-P-596-A-89) and for the Wyoming 4 (Niobrara) RSA (File No. 10116-CL-P-721-A-89), the application of Centaur Partnership for the South Carolina 7 (Calhoun) RSA (File No. 10720-CL-P-631-A-89), and the application of Bravo Cellular for the North Carolina 15 (Cabarrus) RSA (File No. 10673-CL-P-579-A-89) ARE REMANDED to the Wireless Telecommunications Bureau for further consideration in accordance with the instructions set forth in paragraphs 81 and 83 above.

101. IT IS FURTHER ORDERED That the revocation proceeding IS TERMINATED with respect to the licenses of Satellite Cellular System, Station KNKN 268, for Market 318 (Arizona 1 - Mohave) (File No. 10037-CL-P-318-A-89); Jaybar Communication, Station KNKN 251, for Market 323 (Arizona 6 - Graham) (File No. 10042-CL-P-323-A-89); Data Cellular Systems, Station KNKN 250, for Market 345 (California 10 - Sierra) (File No. 10029-CL-P-345-A-88); Cellular Pacific, Station KNKN 252, for Market 346 (California 11 - Eldorado) (File No. 10031-CL-P-346-A-88); North American Cellular, Station KNKN 253, for Market 388 (Idaho - Boundary) (File No. 10066-CL-P-388-A-88); and Crystal Communications Systems, Station KNKN 309, for Market 606 (Oregon 1 - Clatsop) (File No. 10078-CL-P-606-A-88).

102. IT IS FURTHER ORDERED That the two modification applications filed by Cellular Pacific (File Nos. 06606-CL-MP-90 and 06688-CL-MP-90) and the modification application filed by Data Cellular (File No. 07080-CL-MP-91) ARE DISMISSED without prejudice.[9]

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[9] The Bureau consolidated these pending matters in this proceeding because opposing comments filed by the Committee for a Fair Lottery urged that action be delayed pending the outcome of the revocation proceeding. *HDO, 6 FCC Rcd at 2930 n.5.* As a result of changes in the Commission's rules regarding cellular modifications, however, the contemplated modifications do not require Commission approval. In their exceptions, Data and Pacific represent that the modifications have

103. IT IS FURTHER ORDERED That Alpha Cellular's application for Market 586 (Ohio 2 - Sandusky) (File No. 10909-CL-P-A-89) IS CONDITIONALLY GRANTED and that its license for Station KNKN 340, for Market 410 (Indiana 8 - Brown) (File No. 10318-CL-P-410-A-88) IS CONDITIONALLY REINSTATED subject to its submission of written documentation within 30 days after the release of this order that it has formally rescinded the Mutual Contingent Risk Sharing Agreement.[10]

104. IT IS FURTHER ORDERED That, pursuant to *47 U.S.C. § 312*(a)(2) of the Communications Act, the license of Alee Cellular Communications, Station KNKN 271, for Market 555 (New Mexico 3 - Catron) (File No. 10074-CL-P-555-A-88) IS REVOKED; and that Alee Cellular Communications IS AUTHORIZED to continue to operate Station KNKN 271 until 12:01 a.m. [six weeks after release of Memorandum Opinion and Order] to enable the licensee to conclude station affairs, PROVIDED, HOWEVER, that if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to continue to operate Station KNKN 271 until final disposition of all administrative and/or judicial appeals.

105. IT IS FURTHER ORDERED That the Motion for Leave to Comment and Comment on the Certification to the Commission of the Joint Motion for Approval of Settlement, filed on January 6, 1995 by Buckhead Cellular, Cellular Applicants' Coalition, Miller Communications, Inc., Skywave Partners, Inc., Thomas Domencich, Committee for a Fair Lottery, Applicants Against Lottery Abuses, and ZDT Partnership IS DENIED; and the Comments on Motion for

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already been accomplished.

[10] We take no action at this time on the pending application of Alpha Cellular for assignment of Station KNKN 340 (File No. 04924-CL-AL-1-90). Upon receipt of written documentation that the licensee has formally rescinded the MCRSA, this matter will be ripe for action by the Wireless Telecommunications Bureau.

Leave to Comment and Comment on the Certification to the Commission of the Joint Motion for Approval of Settlement, filed January 30, 1995, by Cellular Pacific and North American Cellular IS DISMISSED as moot.[11]

106. IT IS FURTHER ORDERED That the Joint Motion for Approval of Settlement, filed on October 20, 1994 by Crystal Communications Systems along with Petitioners Thomas Domencich, the Committee for a Fair Lottery, Applicants Against Lottery Abuses, Buckhead Cellular Communications Partnership, Miller Communications, Inc., Skywave Partners, Inc., Cellular Applicants' Coalition, and ZDT Partnership IS GRANTED; that the Joint Motion for Approval of Settlement, filed on April 18, 1995 by Alpha along with these same Petitioners IS GRANTED to the extent that it concerns Alpha's authorization for the Indiana 8 RSA market and IS HELD in abeyance to the extent that it concerns Alpha's pending application for the Ohio 2 RSA market.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

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[11] Petitioners seek leave to comment on the question certified to the Commission by the Review Board. Pacific and North American request permission to file responsive comments. The rules do not authorize the parties to file comments relating to a question certified by the Board, and the Commission has not requested such comments. Moreover, the parties had ample opportunity to comment on the Crystal settlement during its pendency before the Board. In fact, during the pendency of the Crystal agreement before the Board, no comments were filed by any party. Under these circumstances, it does not appear that affording the parties a further opportunity to comment on the Crystal settlement will assist the Commission.

APPENDIX D

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

7 FCC Rcd 8686

In re Application of ALGREG CELLULAR ENGINEERING For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin; In re Application of CRANFORD CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne; In re Application of NEW-ERA CELLULAR TELE-COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 332, Arkansas 9 - Polk; In re Application of BAY CELLULAR OF FLORIDA For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497, Mississippi 5 - Washington; In re Application of FLORIDA CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505, Missouri 2 - Harrison; In Re Application of A-1 CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514, Missouri 11 - Moniteau; In re Application of BRAVO CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579, North Carolina 15 - Cabarrus; In re

Application of TNT COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 582, North Dakota 3 - Barnes; In re Application of ALPHA CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 586, Ohio 2 - Sandosky; In re Application of CEL-TEL COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589, Ohio 5 - Hancock; In re Application of EJM CELLULAR PARTNERS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596, Oklahoma 1 - Cimarron; In re Application of PINELLAS COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613, Pennsylvania 2 - McKean; In re Application of CENTAUR PARTNERSHIP For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631, South Carolina 7 - Calhoun; In re Application of SIGNAL CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632, South Carolina 8 - Hampton; In re Application of A-1 CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661, Texas 10 - Navarro; In re Application of EJM CELLULAR PARTNERS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4 - Niobrara; In re Application of TNT COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 727, Puerto Rico 5 - Ceiba; In re Application of SATELLITE CELLULAR SYSTEMS For facilities in the

Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318, Arizona 1 - Mohave, for Station KNKN 268; In re Application of JAYBAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6 - Graham, for Station KNKN 251; In re Application of DATA CELLULAR SYSTE MS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345, California 10 - Sierra, for Station KNKN250; In re Applications of CELLULAR PACIFIC For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 346, California 11 - El Dorado, for Station KNKN 252; In re Application of NORTH AMERICAN CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388, Idaho 1 - Boundary, for Station KNKN 253; In re Applications of ALPHA CELLULAR For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 - Brown, for Station KNKN 340; For assignment of Station KNKN 340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 RSA.; In re Application of ALEE CELLULAR COMMUNICATIONS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555, New Mexico 3 - Catron, for Station KNKN 271; In re Application of CRYSTAL COMMUNICATION SYSTEMS For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606, Oregon 1 - Clatsop, for Station KNKN 309

File No. 10607-CL-P-307-A-89; File No. 10611-CL-P-311-A-89; File No. 10563-CL-P-332-A-89; File No. 10754-CL-

P-497-A-89; File No. 10445-CL-P-505-A-89; File No. 10454-CL-P-514-A-89; File No. 10673-CL-P-579-A-89; File No. 10233-CL-P-582-A-89; File No. 10909-CL-P-586-A-89; File No. 10912-CL-P-589-A-89; File No. 10567-CL-P-596-A-89; File No. 10808-CL-P-613-A-89; File No. 10720-CL-P-631-A-89; File No. 10721-CL-P-632-A-89; File No. 10409-CL-P-661-A-89; File No. 10116-CL-P-721-A-89; File No. 10678-CL-P-727-A-89; File No. 10037-CL-P-318-A-89; File No. 10042-CL-P-323-A-88; File No. 10029-CL-P-345-A-88; File No. 07080-CL-MP-91; File No. 10031-CL-P-346-A-88; File No. 06606-CL-MP-90; File No. 06688-CL-MP-90; File No. 10066-CL-P-388-A-88; File No. 10318-CL-P-410-A-88; File No. 10318-CL-P-410-A-88; File No. 10074-CL-P-555-A-88; File No. 10078-CL-P-606-A-88

APPEARANCES

David Kaufman, Robin Neitert, Loretta K. Tobin, Stephen Coran and Stephen Kafee on behalf of Algreg Cellular Engineering; John P. Bankson, Jr., Neal M. Goldberg, Joe Dickson Edge, Sue W. Bladek and Elizabeth A. Marshall on behalf of Cranford Cellular Communications, New-Era Cellular Tele-Communications, Bay Cellular of Florida, A-1 Cellular Communications, TNT Communications, Cel-Tel Communications, EJM Cellular Partners, Pinellas Communications, Centaur Partnership, Jaybar Communications, Alee Cellular Communications; David L. Hill, Audrey P. Rasmussen, and Andrew Erlich on behalf of Signal Cellular Communications, Satellite Cellular Systems, Data Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications Systems; Larry S. Solomon, and Dan J. Alpert on behalf of Florida Cellular and Bravo Cellular; Alan Y. Naftalin and Herbert D. Miller, Jr., on behalf of Alpha Cellular; Clifford M. Harrington, Eliot Greenwald, Kathryn R. Schmeltzer, and Scott Flick on behalf of Applicants Against Lottery Abuse; Carl W. Northrop, Rosemary T. Rakas, and Rebecca L. Dorch on

behalf of the Committee For a Fair Lottery, and Thomas Domencich; Richard S. Myers on behalf of Buckhead Cellular Communications Partnership; James F. Ireland III, John Davidson Thomas and Francis Chetwynd on behalf of Cellular Applicants Coalition; Donald Evans, James Kline, and Donald Douglas on behalf of Miller Communications, Inc. and Skywave Partners, Inc.; Peter Gutmann, Louise Cybulski, and William J. Bowman on behalf of Pepper and Corrazini; Hugh Taylor and William Zimsky on behalf of ZDT Partnership; Mark Fox Evens and Michael Maroney on behalf of witness Eric Leong; and Carmen Borkowski, Gerald Zuckerman, Joseph Weber on behalf of Chief, Common Carrier Bureau (FCC).

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: November 19, 1992; Released: December 22, 1992

TABLE OF CONTENTS

TOPICS	**Findings of Fact**	**PARAGRAPHS**
Introduction		F-1-11
Background		F 12-79
A-1 Cellular Communications		F 80-111
Cranford Cellular Communications		F 112-113
New Era Cellular Tele-Communications		F 151-201
Alee Cellular Communications		F 202-232
Cel-Tel Communications		F 257-256
Algreed Cellular Engineering		F 257-271

Jaybar Communications	F 272-298
Pinellas Communications	F 299-325
Florida Cellular	F 326-344
Bay Cellular of Florida	F 345-369
Centaur Partnership	F 370-402
EJM Cellular Partners	F 403-423
Data Cellular System	F 424-450
Satellite Cellular System	F 451-480
Signal Cellular Communications	F 481-499
Crystal Communications Systems	F 500-530
Cellular Pacific	F 531-567
North American Cellular	F 568-599
Bravo Cellular	F 600-633
Alpha Cellular	F 634-700
Conclusions of Law	C 1-C 30

FINDINGS OF FACT INTRODUCTION

1. On May 29, 1991, the Chief, Common Carrier Bureau designated, inter alia,[1] the following fourteen Rural Service Area (RSA) cellular applicants for hearing *(6 FCC Rcd 2921):* (1) Algreg Cellular Communications; (2) Cranford Cellular Communications (3) New Era Cellular Tele-Communications; (4) Bay Cellular of Florida; (5) Florida Cellular; (6) A-1 Cellular Communications; (7) Bravo Cellular; (8) TNT Communications; (9) Alpha Cellular; (10)

[1] The Chief, Common Carrier Bureau has removed 21st Century Cellular as an RSA applicant in this proceeding. See FCC 92-79 released March 10, 1992 at paras. 12-14 and Footnote 14, and FCC 92M-320, released March 13, 1992 (Confirming Order).

Cel-Tel Communications; (11) EJM Cellular Partners; (12) Pinellas Communications; (13) Centaur Partnership; and (14) Signal Cellular Communications.

2. In that same Designation Order, and because there were common issues of law and fact with the fourteen applicants just described, the Chief ordered, inter alia,[2] the following eight Rural Service Area (RSA) cellular licensees to show cause why their licenses should not be revoked: (1) Satellite Cellular Systems; (2) JayBar Communications; (3) Data Cellular Systems; (4) Cellular Pacific; (5) North American Cellular; (6) Alpha Cellular;[3] (7) Alee Cellular; and (8) Crystal Communications.

3. In addition to the Chief, Common Carrier Bureau, the following parties participated actively in the trial of this proceeding: (1) Applicants Against Lottery Abuse; (2) The Committee For a Fair Lottery; (3) Thomas Domencich; (4) Miller Communications, Inc; (5) Skywave Partners, Inc.; (6) Buckhead Cellular Communications Partnership; (7) Cellular Applicant's Coalition;[4] (8) Pepper and Corrazini; and (9) ZDT Partnership.

4. The applications of the 14 applicants listed in paragraph 1 supra. were designated for hearing on the following issues *(6 FCC Rcd 2921 at 2928):*

> A-1: To determine all the facts and circumstances surrounding the applicant's involvement with the Agreements;[5]

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[2] Originally there were nine licensees. But Edison Cellular is no longer a part of this proceeding. See FCC 92M-384 released March 26, 1992.

[3] Alpha Cellular is both a cellular applicant and a cellular licensee. See para. 1(9) and 2(6).

[4] Aka Cole, Raywid, and Braverman. See FCC 91M-2056 released July 5, 1991.

[5] The "Agreements" referred to are the East Coast and West Coast "Mutual Contingent Risk Sharing Agreements" described in para. 1 of the HDO. See *6 FCC Rcd 2921.*

A-2: To determine, based on the evidence adduced on Issue A-1 above, which if any of the applicants entered into the Agreements;

A-3: To determine, based on the evidence adduced above, which, if any of the applications should be denied.

5. In designating the above issues, the Chief made it clear (at 2928) that ". . . the only question to be resolved is whether the individual applicants have, in fact, entered into the Agreements or otherwise taken actions which made them parties to the risk sharing provisions . . . [i]f it is found that they are bound by the Agreements then their applications should be denied."

6. In designating the eight RSA licensees, the Chief set down the following issues *(6 FCC Rcd 2928):*

L-1: To determine all the facts and circumstances surrounding the permittees involvement in the Agreements;

L-2: To determine, based on the evidence adduced on Issue L-1 above, which if any of the permittees entered into the Agreements.

L-3: To determine whether the permittees who entered into the Agreements falsely certified their applications (Section 22.923) or violated Section 1.65 of the rules with regard to their applications when they were pending.

L-4: To determine whether Alee Cellular lacked candor in failing to reveal to the Commission an alien general partner or that it changed the nature of its partnership;

L-5: To determine whether Alee Cellular complied with the requirements of Section

310(b) of the Communications Act and Section 22.4 of the Rules.

L-6: To determine on the totality of the evidence adduced pursuant to L-1, L-3, L-4, and L-5 above, whether the permits of any of the captioned permittees should be revoked.

7. Both the burden of proceeding and the burden of proof on Issues A-1 through A-3 was placed on the individual applicants. See *6 FCC Rcd 2928 at para. 49.* On Issues L-1 through L-6 the burden of proceeding with the introduction of evidence was placed upon the Chief, Common Carrier Bureau while the ultimate burden of proof remained with the individual licensee.

8. At a hearing session held on October 30, 1991, and pursuant to 47 CFR 1.298(b), the Trial Judge orally added an abuse of process issue against four of the licensees represented by David L. Hill, Audrey P. Rasmussen, and Andrew Erlich: (1) Satellite Cellular Systems; (2) Cellular Pacific; (3) North American Cellular; and (4) Crystal Communications Systems. See FCC 91M-3213, released November 5, 1991.[6]

9. That abuse of process issue reads:

L-7: To determine if Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications System have abused the Commission's processes by failing to comply with valid discovery requests, and if not whether they possess the requisite character qualifications to be a Commission licensee.

10. We exchanged our direct case exhibits and witness lists at the August 29, 1991 Prehearing Conference. At the

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[6] FCC 91M-3213 also served as a Notice of Forfeiture. See paras. 5-7 of that Order. Also see FCC 91M-2954 released September 27, 1991.

Evidentiary Admission Sessions held on September 6, 9, 12, and 13, 1991, 588 exhibits were formally identified and ruled upon.[7] We started the hearing on September 30, 1991 and completed the Phase I hearings on November 22, 1991. During the Phase I hearings we took the testimony of some 57 witnesses. We held the phase II hearings on March 9 and 10, 1992. The evidentiary record was closed on March 10, 1992 (Tr.13223-13224).

11. The parties filed their Proposed Findings of Fact and Conclusions of Law on February 7, 1992 and their Reply Findings on February 24, 1992.

Background

12. When the Commission tried to administer the Metropolitan Statistical Area (MSA) phase of the cellular allocation program, applicants flooded it with applications. Then after these applications were filed, the applicants entered into partial settlements. This two-step procedure resulted in a host of speculators filing MSA applications; i.e., people who had no real interest in actually constructing and operating a cellular station.

13. Application preparers and promoters encouraged their applicants to form post-filing, pre-lottery partial settlements or "alliances."[8] This ability to sell, trade or transfer minority interests in cellular licenses encouraged speculators and

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[7] All in all over 770 exhibits were formally identified and ruled upon during the course of the proceeding; i.e., both Phase I and Phase II.

[8] The Commission described the situation this way: "By 'partial settlement' we mean any arrangement among fewer than all the applicants in a market that provides any reciprocal interests in the applications of the parties to the arrangement. The term includes the so-called 'alliance agreements' whereby each participant in the alliance agrees that if it wins a particular market it will retain at least 50.1% of the application and that other members of the alliance will each obtain a maximum interest of 0.99% in the winning application."

abusers of the cellular process. This, in turn, has impeded and delayed the proper development of the MSA program.

14. The Commission determined that the RSA phase[9] of the cellular allocation program wouldn't suffer from the same infirmities. So they passed a bevy of rules designed to deter speculation, discourage abuse, and ensure a fair shake for each lottery applicant.

15. They passed 47 CFR 22.33(b)(2). That rule prohibits partial settlement agreements among nonwireline RSA applicants. They passed 47 CFR 22.921. That rule prohibits multiple ownership interests in competing nonwireline RSA applicants. They passed 47 CFR 22.922. That rule prohibits the transfer of interests in pending applications. And they passed 47 CFR 22.923(b)(7). That rule requires all applicants to certify that their application is complete, that it complies with the Commission's rules, and that there are no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect ownership interest.

16. The passage of these several rules had a far-reaching impact on the development of the RSA phase of the cellular allocation program. For by eliminating "alliances" and partial settlements the Commission took away one of the vital selling tools of the cellular application preparer and promoter. That fact is important. Because that's what this case is all about.

17. This proceeding is the saga of one such cellular application preparer and promoter, The Cellular Corporation (TCC), and their efforts to circumvent the FCC's rules (See Finding 15 supra.) Every one of the fourteen remaining

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[9] RSA's consist of those cellular markets not categorized as Metropolitan Statistical Areas (MSAs) or New England County Metropolitan Areas (NECMAs). See *Rural Cellular Service (First Report and Order), 60 RR 2d 1029 (1986)* Fn.1.

captioned RSA applicants (See Finding 1 supra.), and every one of the eight remaining captioned RSA licensees (See Finding 2 supra.) are TCC promotions.

18. TCC was founded and formed by Nicholas Wilson[10] in 1984 for the purpose of marketing cellular applications. They marketed their applications predominately through brokers or salespeople on a commission basis. Wilson obtained his sales force by hiring Kent Maerki as TCC's marketing director.[11] Maerki already had a sales force in place at the time Wilson hired him. As founder and Chief Executive Officer of an organization known as Spectra

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[10] Wilson had a scrape with securities authorities as early as 1981. On July 20, 1981, the Securities and Exchange Commission issued Release No. 17955 In the Matter of W.M.C. Roney and Co. and Nicholas R. Wilson, File 3-6043, SEC Docket, Volume 23, No. 3, dated August 4, 1981. After a public hearing and pursuant to offers of settlement, Wilson was suspended for one year from association in any capacity with any broker-dealer, investment company, investment advisor, or municipal securities dealer.

[11] Maerki has a sordid business background. In 1976 he lost his NASD license because he made false and misleading statements in connection with a margin account. The NASD censured him and barred him for life throughout the United States. Next Maerki and an associate developed a program to market refurbished railroad cars for leaseback. That resulted in his being sued for selling securities based upon material misrepresentations and for omitting to state material facts. Next, in 1983, Maerki helped form a company called Food Source, Inc. That company marketed refrigerated intermodal shipping containers as tax shelters. The SEC sued him, and Maerki signed a consent decree. On September 25, 1984, that consent decree was entered in the United States District Court for the Northern District of California. He was permanently enjoined from offering to sell or buy securities in violation of Section 5 of Securities Act. Next, he began selling unregistered securities in Illinois, and the State of Illinois instituted an action against him. They charged him with violating the registration provisions of the Illinois Securities Act of 1953, and for failing to disclose, inter alia, the September 25, 1984 California consent order. There he agreed not to sell securities in Illinois for two years, and to pay a $ 1500 fine. In Illinois, it was an IRS investigation and a series of newspaper articles that described his product as a scam that "really stopped sales cold." (Tr.4811).

Financial Corporation Maerki had "developed a pretty good network of salespeople." (Tr.4811).[12]

19. Wilson insisted that Maerki's people not hold themselves out as Spectra representatives, but as independent contractors. Spectra was organized with a hierarchy of sales personnel. There were regional managers such as Neil "Doc" Scott under whom were district managers such as Phil Kosh. Consequently, Maerki organized the TCC sales force along the same lines. Under Maerki were Allan Kane, John Dudeck, Dale Aborn, Edward Massey, George Ralston, Robert Baker, Doc Scott, Eric Leong and Phil Kosh. Later Stan Malecki joined as a broker during the RSA phase of the cellular program. In January, 1985, Greg Neely became TCC's Secretary-Treasurer.

20. During the MSA days, Spectra provided sales material to the regional and district managers with the coordination of TCC's offices in Cleveland. In fact, initially the TCC applications were prepared at Spectra's facilities (Tr.4831). Maerki got a 56% commission on sales, 70 percent of which he testified went to his sales force (Tr.4829). The FTC investigation, civil action, asset freeze, consent decree, and fine infra ostensibly terminated Mr. Maerki's TCC activities in 1986.

21. During 1985, and while the MSA program was in full swing, the Federal Trade Commission brought an action against TCC, Spectra et. al. And on November 13, 1985, the United States District Court for the Northern District of California temporarily restrained TCC from the following activities among others:

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[12] Spectra was formed to make investment products available to financial planners (Tr.4813). These included "antiquities" and "investment grade diamonds." (Tr.3115-3116, 4813). Spectra's main products were tax shelters such as energy devices and record masters (Tr.4816-4817).

"1. Falsely representing in any manner, directly or indirectly that any applicant in the Federal Communications Commission (FCC) non-wireline telephone license lottery is likely to obtain all or part of a cellular telephone license;

"2. Falsely representing in any manner, directly or indirectly, that past agreements among applicants for a license in the FCC lottery to share in the license (market settlement agreements) suggest that future applicants in the FCC lottery are likely to receive part of a license through similar agreements;

"3. Misrepresenting in any manner, directly or indirectly the value or profit potential of a license awarded through the FCC lottery;

"6. Misrepresenting in any manner, directly or indirectly, the qualifications of, or services provided by application preparers;

"8. Misrepresenting in any manner, directly or indirectly, any other fact material to a customer's decision to purchase application preparation services for the FCC lottery." (Alpha Ex.10, pp.3-4).

22. The District Court also restrained TCC from transferring, disbursing, concealing, dissipating or otherwise disposing of any funds. TCC operated under the Temporary Restraining Order (TRO) until March 4, 1986. At that time the TRO was merged into "Stipulation for Consent Decree and Permanent Injunction." Under the Consent Decree TCC et. al. were required to disclose "in all sales brochures, in every oral presentation, and on the front page of all sales or service contracts or agreements with purchasers of their services" the following two items:

"(1) The purchase of an application from the Cellular Corporation for the Federal Communications Commission's cellular telephone lottery is a high-risk investment. Do not purchase an application unless you can afford and are prepared to lose all the money invested."

"(2) An operating cellular system is unlikely to return any profits to its owners in at least the first three years of operation."

23. Also under the March 4, 1986 Consent Decree, TCC and its co-defendants were required to contribute $ 400,000 "to be used to complete the application process," and Kent Maerki was personally ordered to pay the FTC the sum of $ 100,000. Eight days later, on March 12, 1986, Maerki filed a voluntary petition under Chapter 11, of the Federal Bankruptcy Code in the United States Court for the Northern District of Nevada. About a year later, the Court converted Maerki's case to a Chapter 7 liquidation proceeding. At least one witness in this case believes that Maerki filed in bankruptcy to avoid paying the FTC the $ 100,000 forfeiture ordered in the consent decree (Tr.4337-4340). In fact, the $ 100,000 fine that the FTC levied against Maerki was discharged in bankruptcy (Tr.4844).

24. Kent Maerki described the impact caused by the TRO, the asset freeze, and the later consent decree. He said, "[t]hat was it. It was over." He described it this way:

"I mean one day they delivered to my wife, myself information that our checking accounts were closed down, our business was closed down, everything . . . they did it to Spectra and me. They did it to Cellular Corporation and Nick Wilson . . . [For one hundred days] . . . we were completely shut down . . ."

25. In a companion case, the Internal Revenue Service charged TCC et. al. with marketing cellular applications as part of an abusive tax shelter scheme (Tr.2197). That case settled, and TCC paid a $ 150,000 penalty (Tr.2198).

26. Maerki sent copies of the consent decree to his brokers in 1986. So he says that it would have been impossible for anyone to have had a business relationship with Spectra, Mr. Maerki, Mr. Wilson, or Mr. Neely without knowing about the FTC consent decree (Tr.4883). As George Ralston (Finding 19 supra.) put it "we were virtually out of business for 6 or 8 months as I recall." Nevertheless, at the hearing, both Allan Kane and Doc Scott (See Finding 19 supra.) feigned ignorance of the FTC decree. It is found that both men were well aware of the FTC proceeding (Tr.4883, 4885, 4886).

27. Following the FTC consent decree Maerki could no longer be involved in TCC sales. But the existing sales force otherwise remained in place for the RSA application sales. They received their commissions (about 30%) directly from TCC rather than through Maerki. At first they dealt with Nick Wilson, later with Greg Neely.

28. TCC hired attorney William Franklin in 1986. Franklin represented clients who had won in MSAs. But he was never told about the FTC proceeding (Tr.2640). It was about this time that the word on the street was that the FCC was going to do away with alliances. When he heard that, Nick Wilson openly asserted that even if the FCC eliminated "alliances," TCC would have "a business plan" that would achieve the same result as "alliances." That was in October, 1986.

29. In November 1986 the FCC started a proceeding to amend the rules for Rural Service Areas (RSAs). See *Rural Service Areas (Notice of Proposed Rulemaking), 1 FCC Rcd 499 (1986).* This included a proposal to eliminate alliances. Although this proposal, if implemented, would put a serious

(if not fatal) crimp in TCC's sales efforts, they did not take the threat seriously (Tr.1523).

30. It was also in November 1986 that TCC began preparing and selling RSA applications. They switched quickly from the MSA program to the RSAs. Otherwise it would have left them with a lot of overhead and little income. Again relying on their brokers, TCC directed their sales efforts at the same people who had participated in the MSAs (Tr.1523, 1805).

31. The brokers told the prospective investors that there was a chance "alliances" would be available (Tr.1531-1532). But they further told those prospective investors that even if the FCC eliminated "alliances" TCC would have "a business plan" that would achieve the same results as alliances (Tr.1536, AALA/CFL Ex. 269, p.3). Stated another way, the brokers took their cue from Wilson (Finding 28 supra.), and used "a business plan" concept as part of their selling pitch.

32. TCC continued selling RSA applications in 1987 and early 1988. Greg Neely, Wilson's neighbor (also see Finding 19 supra.) became TCC's President in August 1987. Wilson also asked Maerki to get re-involved in marketing TCC's RSA applications. Neely, Wilson, and Maerki conducted seminars for prospective clients that the brokers set up. For example, Maerki conducted a seminar in Oceanside, California on June 7, 1988, that was set up by Doc Scott. Maerki was billed as "one of America's top experts on Cellular Income for You" (CCB Ex.181; Tr.4867). Prospective investors at these seminars were told the partyline; i.e., there was a chance that "alliances" would be available, and if not that the "business plan" would be implemented that would give them something close to an alliance (Tr.2385, 4856). TCC's objective was to cultivate in investors a "comfort level" comparable to what they had had from alliances during the MSA days (Tr.4851).

33. TCC was selling RSA applications for individual markets. By February, 1988 they had sold 11,500 RSA

applications. People had bought under the assumption that there would be a plan by whatever name (alliances, business plan, linkage, risk-sharing) that would allow them to share revenues with others. People had even been advised that they could get their money back if they didn't like the final rules adopted by the FCC (Tr.1541).

34. Then, on March 29, 1988, TCC's President, Greg Neely, notified the brokers (sales force) that it appeared that the FCC was going to ban alliances after all. He also indicated that scrutiny by competing sales organizations made it prudent not to pursue Wilson's "business plan." Instead Neely suggested "a partnership format;" i.e., he recommended forming partnerships which would file in all 428 RSA markets.

35. The brokers advised Neely that the new approach was unacceptable. As Neely puts it they ". . . got back to me and advised me that was unacceptable, that they had sold applications with the idea that their clients expected a business plan and they wanted a business plan. So we -- that's when I commenced trying to figure out if there was a way to do a business plan" (Tr.1561).

36. The brokers let Neely know that without "a business plan" or "alliances" the clients' money would have to be refunded. This concerned Neely because TCC did not have the funds to give the money back.

37. In early April, 1988, Neely sent a packet of TCC promotional materials to the brokers. Included in that packet was a sample general partnership agreement. It was intended that the partnerships would incorporate later. Neely also included in the packet a letter dated April 4, 1988. That letter explained the partnership program. It also recommended that relatives or husband and wives join different partnerships to increase the odds of winning.[13]

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[13] This advice was obviously also designed to circumvent the prohibition

38. Since his own sales force (the brokers) couldn't abide his March 29, 1988 letter (Finding 34 supra.), Neely next tried to come up with "a business plan." He came up with the idea of "linked partnerships." Under this concept 10 partnerships would link together thus increasing the probabilities of winning.

39. On April 21, 1988, the FCC issued a News Release. They stated that they (1) had prohibited RSA alliances and partial settlements; (2) had prohibited transfers of interests in pending RSA applications; and (3) had eliminated the rule which allowed applicants to own up to 1% of other applicants (CCB Ex. 307; Tr.1587-1588, 1590, 2379). William Franklin (Finding 28 supra.) sent Neely a copy of that release.

40. Six days later (April 27, 1988), TCC held seminars in New Jersey and Florida to announce their new "linked partnership" plan. They indicated that this was the plan that would replace alliances. The plan was to involve both linking and profit sharing. The purpose of linking was to reduce the investor's risk of losing his full investment, and the profit sharing was to be of other people's licenses (Tr.1593, 1594, 1675).

41. The April 27, 1988 New Jersey meeting was held at the Coachman's Inn in Cranford, New Jersey. Greg Neely conducted that seminar. He told the investors that the purpose of the interlocking arrangement was to minimize risk and maximize potential profits, the same goals that the alliance program had. Neely used a slide presentation and relied on Charts captioned "Strength in Numbers" and "There Can Be Problems in Going it Alone." Neely told the investors that an attorney had not yet worked on the linkage idea, but would be developing a contract later on.[14]

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on having interests in more than one application per market. See e.g. *56 F.R. 28559* supra. at para. 24.

[14] The contract Neely was referring to turned out to be the "Mutual

42. The April 27, 1988 Florida meeting was held at the Kapok Tree in Madeira Beach, Florida.[15] The meeting was conducted by Kent Maerki and Kathy Dolezal (a TCC employee). The presentation was substantially the same. However, Maerki didn't discuss linkage at the seminar, and he told John Dudeck (see Finding 19 supra.) that he wasn't involved in linkage because he believed it had security problems (Tr.4903; also see Finding 21(1) and 21(2) supra.).

43. The people at both the Florida and New Jersey meetings were told that there was one chance in a million of losing your investment (Tr.1983). Allan Kane (See Finding 19 supra.) who set up and presided over the Cranford meeting described the linkage program as follows:

> "The odds of your LOSING your investment with the TCC formula are now so remote that we are pleased to describe to you how 'The Century's Greatest Opportunity' has been converted to 'The Century's Safest Risk'." (AALA/CFL Ex.61).

44. On or around May 5, 1988, in a taped telephone conversation, Neely explained the linked partnership concept to a TCC West Coast broker, Doc Scott. Neely told Scott that a contract would be drawn up (AALA/CFL Ex. 4; Tr.1638-1639, 1643; also see Fn.14 supra.). Scott, in turn, informed his West Coast investors about linkage.

45. Neely also wrote a letter to Ed Massey (See Finding 19 supra.) in May 1988. There he explained the contemplated link/sharing program, and told "Massey (TCC's broker in Dallas, Texas) that the purpose of "linking" was to "stack the

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Contingent Risk Sharing Agreements" (MCRSAs) that are the subject of this proceeding. See Footnote 5 supra.

[15] There were meetings held in Melbourne and Titusville, Florida in the April 27 - May 12, 1988 time frame. Greg Neely conducted those meetings and his remarks were identical to those he made at the Cranford, New Jersey seminar.

odds" in favor of participants in the linking (or profit sharing) program (CCB Ex. 15; Tr.1645-1646, 1651, 2018).

46. On May 18, 1988 the FCC released the rules that: (1) prohibited RSA alliances and partial settlements; (2) prohibited transfers of interests in pending RSA applications; and (3) eliminated the rule which allowed applicants to own up to 1% of other applicants. (Alpha Ex.4, Tr.1651; Findings 29 and 39 supra.) Neely immediately received a copy of those rules.

47. A few days later, Neely received a call from Fred Marsh. Marsh ran a competing application mill. He (Marsh) questioned the legality of the link program's revenue distribution. Neely's version of that conversation is, in part, as follows (Tr.1652):

> "He went on about that this was a tricky way of circumventing the rules and so on and so on . . . He says that we shouldn't be doing this and since we were representing some of his clients in the application preparation phase, he demanded a full refund of his money for those applications . . ."

Neely "immediately" contacted Mr. Franklin by phone on May 23, 1988, right after Mr. Marsh called. They discussed the "basic philosophy" behind TCC's linkage program (Tr.1653). Franklin indicated that it was not the kind of thing that, on first hearing, I felt that I could understand over the phone." So Neely and Franklin arranged to meet in Franklin's office on May 25, 1988. However after their conversation, Franklin did call Tom Gutierrez, Fred Marsh's attorney (Tr.2391, AALA/CFL Ex. 17).

48. They met on that day. Neely brought with him the slide presentation that had been used in the New Jersey and Florida seminars (Findings 40-43 supra.). He explained the

program to Franklin and told Franklin he (Neely) thought linking didn't violate the FCC rules about ownership and control. Neely further stressed how important the linking/profit sharing plan was, and told Franklin if there was a way to do it, he wanted to do it.

49. Franklin opined that revenue-sharing would be inconsistent with the Commission's rules, but that it might be possible to come up with something similar which would be consistent. But Franklin pointed out ". . . that there would be a level of risk in terms of [FCC] acceptability of any agreement which . . . could not be eliminated and I explored with him and suggested whether he really wanted to go forward with this program at all, and I was told, in very absolute terms, that he wanted me to -- proceed." (Tr.2663).

50. If one is to fully understand the thrust of the Neely-Franklin May 25, 1988 meeting, it is also important to know what Neely did not tell Franklin. Neely never told Franklin that as of May 25, 1988, virtually all of TCC's RSA application sales had already been made (Tr.2350, 2385). Nor did Neely tell Franklin that TCC had already been promoting linkage. Rather, Neely presented the plan to Franklin as being merely prospective in nature (Tr.2381, 2390)[16] In any event, Franklin was to research the problem, and if it could be done, draft the agreement (Tr.2664).

51. The next day, May 26, 1988, Fred Marsh wrote Nick Wilson (CC noted to Mr. Neely). There Marsh said:

> "It has recently come to my attention that the Cellular Corporation is publicly and broadly promoting an RSA scheme based upon 'revenue sharing' among TCC-sponsored partnerships . . .

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[16] Thus Franklin believed his job was to help TCC avoid problems before they arose. He didn't realize that his task was to bail TCC out after they were in trouble. Not always, but frequently, this can cause the lawyer to adopt different tactics or at least shift the emphasis to meet the problem.

> on the basis that if one partnership wins and another doesn't the one that wins will 'share revenues' with the one that doesn't . . . [s]hould one of TCC's 'revenue sharing' partnerships actually be selected in one or more RSA lotteries, that win will be challenged early and often." (CCB Ex.11).

52. On June 3, 1988 two events of consequence to this proceeding occurred. First, Franklin completed a draft of the "Mutual Contingent Risk Sharing Agreement" (MCRSA) and sent it to Mr. Neely (AALA/CFL Ex.11). In his transmittal letter, Franklin said: "I believe that we have drafted an agreement which accurately reflects your concept. However, because of the complexity of the concept, you should review it carefully." Franklin also asked Neely to "[p]lease call with your comments so that we can finalize the agreement for your broker's use" (AALA/CFL Ex. 11)(underlining added).

53. But on the same day June 3, 1988, Nicholas R. Wilson, TCC's owner and Chairman, and Steven L. Wasserman, TCC's legal counsel and a director, sent a "FOR IMMEDIATE RELEASE" memo to "ALL CELLULAR CORPORATION STAFF, BROKERS AND SALES AGENTS." That memo dealt with the "MARKETING OF RSA APPLICATIONS SUBSEQUENT TO THIRD REPORT AND ORDER OF MAY 18, 1988."

54. That June 3, 1988 memo reads:

> "We have been advised that some of you may be promoting a 'revenue sharing' or other similar business plan in marketing RSA application services. Such representation, if being made, is to cease immediately.
>
> You are not authorized to make any statement to prospective applicants concerning 'revenue

sharing' or similar alliance agreements, as such plans are clearly violative of recently adopted FCC rules. Do not risk the qualifications of the applicant to win a license.

TCC cannot promote any partnerships for filing RSA applications. Your clients are responsible for forming partnerships or business entities for which TCC will engineer, prepare and file RSA applications.

Please advise clients and prospects accordingly.

cc: William J. Franklin, Esq." (CCB Ex. 17, P.2.[17] [18]

55. A copy of the "Intermediate Release" memo was sent to Allan Kane (TCC's New Jersey regional director and broker), to John Dudeck's Florida office, and to TCC's Sausalito, California office. Greg Neely was upset with the substance of the "Immediate Release." He knew Wilson had collected a lot of money under that promise (Tr.1808).

56. Wilson later explained to Neely why he had prepared and distributed the release (Tr.1664-1665). Wilson thought revenue sharing wasn't legal (Tr.3247). Steve Wasserman, who co-authored the release, wasn't comfortable with the securities aspects of the MCRSA. He was never convinced

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[17] It's clear that as of June 3, 1988, TCC's President Greg Neely, and TCC's Owner and Chairman Nicholas Wilson were traveling on different and inconsistent paths. Wilson apparently was reneging on his promise that even if the FCC eliminated "alliances" TCC would have "a business plan" that would achieve the same results as an "alliance." See Finding 25 supra. Wilson was also now distancing TCC from its brokers whom he had always considered independent contractors. See Finding 19 supra.

[18] A TCC principal and a witness in this case, Pendleton Waugh testified that during this time frame he (Waugh) and Nicholas Wilson discussed the propriety of the Mutual Contingent Risk Sharing Agreement (MCRSA). See Tr.4141, 4145-4147).

there wouldn't be a securities problem (Tr.1658-1659, 2034). Nicholas Wilson, TCC's owner, has never retracted the June 3, 1988 release (Tr.2035).

57. On June 7, 1988, Greg Neely, Allan Kane, and Steve Wasserman met with William Franklin in Franklin's office to discuss the matter. During that meeting Franklin told Neely that there was a 98% probability that the FCC would approve the Mutual Contingent Risk Sharing AGreement that he had drafted (See Finding 52 supra.); i.e. that it would be passed and accepted by the FCC in the form in which he had prepared it. Neely said that if the probabilities of success and acceptance by the FCC were that high he wanted to go ahead with the linking ". . . because we didn't really want to have to give back all the money [to people who had bought applications] and we would have a problem giving it back." (Tr.1664-1665, 2451). Allan Kane wanted the agreement to be prepared for execution by the partnerships with which he was affiliated (Tr.2708-2709).

58. Meanwhile, on June 7, 1988, out on the West Coast, in Oceanside, California, a seminar was held. Doc Scott set up the seminar; Kent Maerki spoke at the seminar. It was at this seminar that the linkage concept was explained to West Coast investors (Tr.4864; CCB Ex.181). From its very inception Maerki thought that the linkage program had securities problems, and that the risk sharing agreement circumvented the intent of the FCC rules (Tr.4361, 4927).

59. Shortly before August 18, 1988, Neely contacted Franklin. He asked Franklin to update or complete the MCRSA and to present it to TCC customers at seminars. Franklin understood that two groups (in Florida and New Jersey) were going to enter into the same agreement, but separately. So he suggested to Neely that there be a separate execution document. Neely agreed (Tr.2709-2710).[19]

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[19] Neely says that he didn't want the MCRSA contract to get in the hands

Franklin prepared his August 18, 1988 draft on that basis; i.e. he prepared a separate Execution Document for the MCRSA with signature pages.

60. Part of Franklin's updated draft of the MCRSA was an added section. That section was numbered 8.4 and reads in part:

> "8.4 Regulatory Risks. Each participant recognizes that the FCC has not approved, ruled on the validity of, or been given the opportunity to approve or rule on the validity of this Agreement. Each Participant accepts the risks that the FCC could disapprove of this Agreement, require a Participant to withdraw from the Agreement, require a Participant to withdraw from the Agreement as a condition to receive an Authorization, dismiss or deny a Participant's FCC Application as a result of its execution of this Agreement or otherwise take action adverse to the interests of one or more Participants . . . each Participant recognizes that these and similar risks are not calculable, and that it has entered into this Agreement after due consideration of the potential benefits and detriments of this Agreement . . ."

61. Franklin included Section 8.4 exclusively for the benefit of his client, TCC (Tr.2467). He said that 8.4 was added ". . . to Protect TCC, which was my client at this time, sole client related to this agreement . . . I thought it was the prudent thing to do . . . to protect them against claims, subsequent claims by their customers who would have signed the agreement." (Tr.2467).

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of the Fred Marsh's and the Tom Gutierrez' of the world. So he ". . . wanted to keep the numbers of contracts to a minimum and in the hands of the people that were in charge of that area." (Tr.2236).

62. East Coast seminars were held in Rockledge, Florida on August 23, 1988; in Tampa/St. Petersburg, Florida at Suncoast Communications office (John Dudeck's office) on August 24, 1988; at the Coachman Inn in Cranford, New Jersey on September 8, 1988; and at Stan Malecki's office in Edison, New Jersey on September 9, 1988.

63. William Franklin arrived for the Rockledge meeting with twenty or thirty copies of the August 18, 1988 draft MCRSA to distribute. But Neely told him not to distribute them. (Tr.2479).[20] Neely told Franklin that he was to allow people attending the TCC seminars to review the MCRSA only if pressed to do so, and only in his (Franklin's) presence, and not to allow anyone to keep a copy (Tr.2509).

64. Franklin then understood that the people who were going to vote on whether to enter the MCRSA would not be permitted to review a copy and make an informed judgment. Rather the procedure was to be for TCC to distribute copies of the MCRSA only to the brokers; the brokers, in turn, would give partnership members or signing partners an opportunity to read the agreement. Franklin never was sure who was qualified to read the agreement. In any event, the partners who attended the seminars were never told who or who couldn't get access to the agreement their partnerships would be entering into.

65. In fact at the Rockledge seminar, John Dolphin (an investor) asked Mr. Franklin to show him the then current

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[20] Franklin's August 18, 1988 transmittal letter to Neely was substantially the same as his June 3, 1988 transmittal (Finding 52 supra. with one significant difference. In his June 3rd transmittal, he asked Neely to "[p]lease call with your comments so that we can finalize the agreement for your brokers' use." In his August 18 letter he left off the last four words "for your brokers use." He simply said [p]lease call with your comments so that we can finalize the agreement." Apparently Franklin now saw what Nick Wilson had seen from the very beginning; i.e., treat the brokers as independent contractors and let them take the fall, if somebody had to take one.

draft of the MCRSA. Franklin tried to talk him out of it. Dolphin persisted, so Franklin showed it to him. (Tr.2512-2513). Following his instructions from Neely, Franklin stayed close to Dolphin while Dolphin was reading the MCRSA (Tr.2874).

66. The Rockledge meeting was put together by George Ralson (See Finding 19 supra.). The August 24, 1988 Suncoast meeting was put together by John Dudeck. Ralston drove Neely and Franklin from the Rockledge seminar to the Suncoast seminar. At these seminars clients were advised that Franklin had completed the MCRSA and found that it complied with FCC rules. The idea of joining the Florida partnerships with the New Jersey partnerships was introduced at these meetings.

67. At Rockledge, Franklin discussed the fact that the FCC had prohibited alliances. He then told the investors that if the MCRSA was disclosed, petitions to deny would be filed; that if the FCC had been asked to pass upon the validity of the MCRSA in advance, they would have said that you cannot do it; that there was some risk that the FCC would not approve the agreement; but that the agreement didn't need to be disclosed to the FCC.[21] Neely also stated that there was ". . . a chance that the FCC would cause . . . our winning applications to be dismissed because we violated this so-called involvement in other applications." (Tr.1717, 2474, and AALA/CFL Ex. 23).

68. At Rockledge partners were given the opportunity to not join the MCRSA (Tr.8734). No one accepted this alternative. George Ralston indicated that the MSRSA agreement was available for anyone who wanted to come to his office (Tr.8752).[22]

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[21] Franklin did not view these "investors" at the TCC seminars as his "clients." As far as he was concerned he had no clients other than TCC which was paying his hourly rate (Tr.2981, 2986-2988).

[22] Later, Stan Malecki (one of the New Jersey brokers working with

69. After the Florida seminar (August 23-24, 1992), but before the New Jersey seminars (September 8-9, 1992), Franklin further revised the MCRSA. He did so after talking over the situation with Greg Neely, and on August 26, 1988, he forwarded what he believed would be the final version of the MCRSA to Neely.[23] This version not only contained the Section 8.4 business risks paragraph (Finding 60 supra.) but two additional sections i.e. 8.5 Business Risks, and 8.6 consultation with the Independent Advisers. The net effect of those two paragraphs was to clear TCC of any business and legal risks by transferring them to the investors. Those sections read in part: (Alpha Ex.1, p.413; Tr.2492):

> "8.5 Business Risks. Each participant recognizes that entering into this Agreement could decrease the marketability of its FCC Authorization for an Eligible System; could increase the difficulty of obtaining on the cost of debt financing for an Eligible System; and could decrease the probability of an individual Eligible System . . . Each participant recognizes that these and similar risks are not calculable, and that it has entered into this Agreement after due consideration of the potential benefits and detriments of the Agreement.
>
> "8.6 Independent Decision. Each Participant has consulted with its tax, financial, legal, or other advisers as it deems necessary or appropriate prior to deciding whether to enter into this Agreement."

Allan Kane wanted to obtain a tape of a Franklin Florida Seminar. But Neely refused to make it available saying he (Neely) wanted to "edit it" first (Tr.3971-3974).

[23] On September 20, 1988, Franklin made minor revisions in the East Coast MCRSA (CCB Ex.26, last 3 pages; Tr.1737-38, 2491, 2775).

70. Although Franklin added Section 8.5 for TCC's benefit he told Neely that the MCRSA was going to be absolutely unworkable for the business reasons set out in that section. Franklin believed that it was going to be difficult for these partnerships to either obtain financing or sell off their interests. Neely responded, "[d]on't worry about that. Our long term goal is really never to implement this agreement but rather . . . combine them into a single corporation with ownership distributed to the various signatories.[24]

71. The final MCRSA had no fundamental changes from what was described at the Seminars (Tr.2010). The linkage program remained the backbone of the whole RSA program and the investors were told just that at the meetings. However, the cautionary provisions of the MCRSA (Paras. 8.4-8.6) were not discussed or even mentioned. Only the brokers knew about them (Tr.2051, 2141).

72. At the Cranford and Edison, New Jersey Seminars (See Findings 62 and 69 supra. the same things were discussed that had been discussed in Florida (Tr.1423, 2498). TCC's brokers used the same format, and Franklin said essentially the same thing. The investors, in attendance, voted at the end of the meeting[25] (Tr.3304). They were also told that there would be a written vote (Tr.2073).

73. At one of the New Jersey meetings, a seminar participant asked for a copy of the MCRSA. Neely did not give him a copy. Instead Neely told the participant to see his broker since it "was inappropriate to have these things floating around at the time."[26]

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[24] TCC's immediate East Coast plan was to link up some 23 New Jersey and Florida partnerships.

[25] Allan Kane assured his clients that the MCRSA was legal. They depended on his advice, because he was "Mr. Cellular in Cranford." (Tr.3558).

[26] Based on the procedures TCC was taking to maintain confidentiality, William Franklin estimated that there was about only a fifty percent

74. Neely gave copies of the August 26, 1988 MCRSAs to both Allan Kane and Stan Malecki at the September 8-9, 1988 meetings, although Allan Kane claims he didn't get his copy until September 15, 1988 (AALA/CFL Ex.83; Tr.2068, 2314, 3708). But Neely says all of TCC's regional directors had a copy of the MCRSA: Allan Kane, John Dudeck, and George Ralston on the East Coast; Tye St.James, Doc Scott and Eric Leong on the West Coast.

75. TCC regional manager, Doc Scott carried the laboring oar for explaining the mechanics of the West Coast MCRSA. He did so via memos, seminars, and a telephone conference call.[27] As previously noted (Findings 44 and 58 supra.), Kent Maerki spoke at a seminar Scott set up in Oceanside, California on June 7, 1988. The linkage concept was explained at that meeting. In addition Scott arranged for a telephone conference call between William Franklin and the West Coast brokers and partnership signatories (Tr.2223). That conference call took place on September 20, 1988. There Franklin explained the MCRSA and went over the various clauses with the conferees.

76. TCC contemplated distributing copies of MCRSA to the brokers who, in turn, would make it available to the signing partner or members of the partnership (Tr.2479-2480). TCC intended to send the Execution Document for signature to each signing partner, and the Terms and Conditions section to the brokers (Tr.2072).

77. Franklin had recommended that there be some documentation in the approval process. While he didn't

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chance the Commission would ever find out about the MCRSA (Tr.2748).

[27] The West Coast investor never lacked for promotional literature. Doc Scott referred to TCC as the "Plus-Quality Company." He boldly announced that "TCC developed the Metropolitan 'alliance' for maximal wins; and now has developed the even finer 'LINKED PARTNERSHIPS' concept for more winners!"

prepare ballots he was shown ballots that Allan Kane and George Ralston had prepared (CCB Ex.12, Tr.2481, 2483). Everyone was aware, investors and brokers alike, that in order to have people bound by the deal, the risk sharing agreement had to be signed before the first cellular lottery which was to be held on September 23, 1988.

78. It is against this common background (Findings 1-77 supra.) that the fourteen captioned RSA cellular winning applicants (Finding 1 supra.), and eight RSA cellular licensees (Finding 2 supra.) must be analyzed. When it adopted a lottery allocation program, the Commission must have been aware that it was extending an open invitation to every gambler, speculator, and confidence man within reading distance.[28]

79. Stated another way it's not surprising that the lottery allocation process has been polluted by the Nicholas Wilson's (Finding 18 and Footnote 10 supra.), the Kent Maerki's (Findings 18-19 and Footnote 11, supra.), the Spectras, and the TCCs (Finding 21-27 supra.) But, like it or not, that is who these fourteen RSA Cellular applicants and eight RSA cellular licensees chose to do business with. So the issues set out at Findings 4, 5, 6, 8 and 9 supra., and the potential rules violations described in Finding 15-17 supra. must be viewed against that factual background.

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[28] The following brief quotation catches the flavor of the sales pitch of these application preparers and promoters. It's from a May 1988 invitation issued by "Ned Alan Scott [Doc Smith], Ph.D., D.D. - Economist, Theologian, Financial Consultant" (Alpha Ex.1, p. 153): "Many of you have won ownership interests in the Federal Communications Commission's coveted CELLULAR LICENSES thankfully. With honest teamwork each of you should become very wealthy and financially independent from these in the future. The FCC's announced that those Opportunities will be gone forever late this year! Have you ever been sorry for doing something right? Do your other friends, (associates, neighbors, and relatives) know that a one-time $ 10,000 invested in these now easily has the potential annual income return of $ 50,000 and more Forever? . . ."

* * * * *

Alee Cellular Communications

151. Alee Cellular Communications, is another Allan Kane New Jersey partnership with 14 partners: (1) Robert A. Bernstein; (2) Joel Bunis; (3) Becky Jo Clark; (4) Vincent DiCostanzo; (5) Kandice Dolphin;[43] (6) Eugene Grumer; (7) Nancy Kielner; (8) Jay B. McInerney; (9) George Malanga; (10) Nadine Marie-Mulvaney; (11) Northeast Cellular Communications; (12) Edward Rogers; (13) Shafi Sharifan; and (14) Dennis Spence.

152. Although he is not a partner in Alee, the formulator, administrator, and driving force behind the Alee partnership is TCC broker, Allan Kane.[44] However, unlike the other five, Alee was not entirely composed of Allan Kane's clients (Tr.3159, 3419-3421). Kane describes Alee as "a pickup team" comprised of investors purchasing applications through other brokers, through TCC directly, or on a walk-on basis. (Tr.3419-3421). The name "Alee" is a combination of the first names of Allan Kane and Lee Ricki, his secretary (Tr.3679). Kane put the partnership together on or about June 1988 (Alee Ex.1A).

153. Allan Kane was Alee's manager at its inception. He chose Robert Bernstein to be the signing partner. Bernstein is Kane's son-in-law. He is a general partner and the largest equity holder in Alee at 22%. Bernstein, an attorney,

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[43] The partner is not really Kandice Dolphin but a partnership called Cellular Dream Partnership.

[44] On January 14, 1990, the partnership ostensibly voted to terminate Allan Kane's services as manager.

received his interest in Alee at a discount for miscellaneous legal advice he provided to TCC (Tr.3201-3202, 5872).

154. Bernstein signed the Alee RSA applications to be filed with the FCC on July 28, 1988. This included the application for the New Mexico 3 (Catron) RSA. The applications were filed on August 12, 1988. He read the transmittal sheet certification and the application certification before signing them.

155. Some but not all of Alee's partners attended Allan Kane's September 8, 1988 Coachman's Inn Seminar in Cranford, New Jersey. For example, Terry Jones attended. He heard William Franklin explain risk-sharing and Greg Neely discuss linking with the Florida partnerships. However, even those Alee partners who did not attend the Cranford Seminar had the linkage (risk-sharing) concept fully explained to them. For example, Becky Jo Clark (See Finding 151(3) supra.) had the concept fully-explained to her over the telephone by Greg Neely (Alee Ex.1, p.2; Alee Ex.5, p.1; Tr.6328, 11,642).

156. Robert Bernstein and Allan Kane had discussed the risk-sharing concept. Kane explained to Bernstein that under the program, profits would be shared even if a signatory to the agreement never won a market. This all occurred before Bernstein received his ballot for the MSRA. Bernstein relied on Kane's explanation. Allan Kane also told Bernstein that the agreement had to be kept confidential so that no one could copy it (Alee Ex.1 at 1, Tr.5871, 5875-5876, 5881-5882, and 6006).

157. On September 12, 1988, Allan Kane sent out two letters to the Alee partners. One letter contained a ballot for the MCRSA. But the other letter was a form that included a question about citizenship. This latter letter will be covered infra. The ballot was identical to the one used for A-1

Cellular (Finding 88 supra.), Cranford Cellular (Finding 117 supra.) and New Era Cellular (Finding 139 supra.)

158. Alee partners were to either "unreservedly . . . approve the PROFIT SHARING PROGRAM and [to] abide by the conditions of same" or to vote against inclusion in the program and "accept the increased risks and reduced potential profits." (AALA/CFL 76). They were also asked to vote whether to join with the twelve Florida partnerships on an equal basis in the profit sharing program.

159. The Alee partners voted in favor of the profit sharing program and to "abide by the conditions of same." They also voted to include the Florida partnerships in the risk-sharing program. (CCB Ex.125; Tr. 5880, 6344-6346, and 11,649-11,653). Alee was well aware of what they were voting for. Terry Jones[45] concluded that revenue-sharing made sense (Tr.11658). When she voted in favor of risk-sharing, Becky Jo Clark (Finding 151(3) and 155 supra.) intended to share profits. (Tr.6467).

160. Allan Kane told Robert Bernstein that all the Alee partners had voted in favor of risk-sharing. So Bernstein, as Alee's signing partner, signed the Execution Page of the MCRSA. He signed sometime before September 20, 1988, on an evening when Allan Kane was having his family over for dinner. When Bernstein signed it he knew it was for the profit-sharing program and that he was signing it for Alee. Allan Kane witnessed Bernstein's signature (Tr.5884).

161. After Alee entered into the MCRSA, Allan Kane sent information letters to his partnerships, including Alee. There he referred to their "ancillary" interests in other applications, ownership interests of family members, and the potentials of

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[45] Actually Terry Jones is Northeast Cellular Communications. See Finding 151(11).

profit-sharing. See e.g. CCB Ex.116; Tr.6445. On November 6, 1989 in a letter to the Alee partners he said, "it should be kept in mind that it was because of this [risk-sharing] concept that most everyone invested in the program, since it was recognized as having substantially reduced the lottery risks" (AALA/CFL Ex.118 at 2).

162. Earlier, on November 14, 1988 Kane wrote a letter to "Cellular Investors." There he proclaimed that the "multiple minority" winners would "experience revenues that were not even projected when they originally invested."

163. In December 1988, Alee won the lottery for the New Mexico 3 (Catron) RSA. Kane "notified the world" by "communicating a letter, sending a letter to everybody, congratulating Alee" (Tr.3424). On August 4, 1989, Alee was granted a construction permit for that market.

164. In 1989 Kane continued to keep his partnerships abreast of cellular lottery developments; i.e. he continued notifying them when their "linked" partners won lotteries (Tr.3431-3433). For example, on April 19, 1989, Kane sent a "General MSA/RSA Status Report" to "Cellular Investors" announcing lottery wins by TNT, JayBar and Alee (CCB Ex.96 at 8, 13). There is no evidence that any of Alee's partners, upon receiving these reports and correspondence, did not consider Alee to be a party to the MCRSA.

165. After discussing the matter with Allan Kane, on November 7, 1989, Robert Bernstein disclosed to the Commission that Alee Cellular was a party to the MCRSA (AALA/CFL Exs.159, 160; Tr.5917). The Alee executive committee had authorized Bernstein to disclose (Tr.6453).

166. Meanwhile Richard Brown of Brown, Finn, and Neitert advised Allan Kane that the termination of the East Coast Agreement "may help our case at the FCC." (CCB Ex.110; Tr.3789). So Kane sent out rescission ballots to the Alee partners as well as to his other partnerships. In January

1990, two-thirds of Alee partners (including Bernstein) voted in favor of rescission (AALA/CFL Ex. #122), Tr.6016-6017). While these East Coast partnerships have tried to rescind the MCRSA, they have apparently been blocked by some losing Florida partnerships refusal to consent to rescission (Tr.8785-8788).[46]

167. It should be noted that Alee entered into the MCRSA in September 1988, long after the U.S. District Court's November 13, 1985 restraining order and long after the FCC had banned alliances and partial settlements.

168. Issues L-4 and L-5. Unlike the other Allan Kane generated applications supra., Alee Cellular faces an alien and an alien misrepresentation issue. See Finding 6, Issues L-4 and L-5 supra.

169. As previously noted (Finding 151(13)), Shafi Sharifan was, and still must be considered an Alee general partner (4%)(CCB Ex.113; Tr.6715). Sharifan is a citizen of Iran; he has never been a United States citizen (Tr.6698-6699, 6702).

170. Sharifan purchased his 4% partnership interest from a Mr. Joseph Lanza, a salesperson for TCC subbroker Stanley Malecki (Finding 19 supra.; and Tr.6707). At the time of purchase Lanza filled out Sharifan's TCC Cellular Applicant Questionnaire (CCB Ex.3), without asking Sharifan the questions (Tr.6710). Thus Sharifan was never asked any

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[46] All the East Coast winners in this proceeding (excluding the non-partnership Algreg) have notified the Commission through declarations that their partners have voted to rescind the MCRSA. See Pinellas Ex.4; JayBar Ex.1; Florida Cellular Ex.1; EJM Ex.2; Centaur Ex.4; A-1 Ex.3; New Era Ex.6; Cranford Ex.3; Alee Ex.1; Edison Ex.1; TNT Ex.2; Cel-Tel Ex.2; and Bay Cellular Ex.2. Thus we have one more almost universal indication that all the East Coast Partnerships believed themselves to be parties to the MCRSA.

questions about his citizenship. He merely signed the completed form.

171. Sharifan thought that Lanza knew he (Sharifan) was not a citizen. On June 27, 1988, Sharifan signed an execution document for the partnership agreement and became an Alee partner (CCB Ex.113; Tr.3460, 6712, 6715). On August 12, 1988 (Finding 154 supra.), Alee filed the applications (including the subject application) listing Sharifan as an Alee partner (Buckhead Ex.42).

172. Sharifan attended Allan Kane's September 8, 1988 Coachman's Inn seminar in Cranford, New Jersey (Finding 155 supra.). There he talked with Allan Kane. Kane, who had never met Sharifan, was immediately struck by Sharifan's physical appearance and accent, and became concerned that one of the partnerships might have alien ownership (Tr.3328-3330). However, and inexplicably, Kane did not simply ask Sharifan about his citizenship (Tr.6718).[47]

173. Kane then talked to Stan Malecki; he told Malecki they should check into the citizenship of the partners, because a gentlemen spoke with an accent (Tr.4558). Malecki checked with Lanza, and Lanza found out that Sharifan was not a citizen. A day or so later Malecki and Lanza met with Sharifan. Sharifan again confirmed to them he wasn't a citizen (Tr.4556, 6720).

174. As a result of his encounter with Sharifan, Kane sent a written inquiry about citizenship status to each partner in the partnerships he managed (See Finding 157 supra.; CCB EX.90; Tr.3330, 3334). Sharifan never responded. So Kane

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[47] Allan Kane claims that during the seminar he announced that non-citizens couldn't be Commission licensees (Tr.3330).

contacted Neely about the problem. Neely said he'd take care of it (Tr.3443).

175. Meanwhile Lanza and Malecki told Sharifan that he'd have to sell his interest. Sharifan decided to transfer his cellular interests to his brother-in-law, Amir Riahi-Shiraz, a United States citizen (Tr.6720-6723; CCB Ex.4). This meeting took place before September 20, 1988 (Tr.4564). On September 15, 1988, Sharifan voted in favor of the MCRSA (CCB Ex.125; Tr.6733-6734).

176. Malecki contacted TCC who sent the necessary transfer papers. On September 23, 1988, Sharifan executed an assignment agreement to transfer his cellular interests to Riahi for $ 10,000 (Alee Ex.2, At.2), although at the time of hearing, he had not been paid (Tr.6725-6726). None of TCC's representatives (Neely, Allan Kane, Malecki, or Lanza) have ever offered Sharifan a refund of the money he has invested. (Tr.6721).

177. Allan Kane had requested documentation about this from Malecki (CCB Ex.12; Tr.3483). And on October 12, 1988, Malecki's office sent Kane the Riahi transfer paperwork to Kane. Sharifan discussed his alien status with Kane (Tr.6752). Malecki was now under the impression that Riahi was a partner, and Sharifan was not, since he was not aware that 47 CFR 22.922 prohibited a transfer of interests in pending applications. (Tr. 4566).

178. Although Allan Kane had requested and received the Sharifan-Riahi transfer papers (Finding 177 supra.), although his September 8th encounter with Sharifan so struck Kane that he initiated an alien ownership inquiry in his partnerships (Finding 172 supra.), and although he had discussed Sharifan's alien status with Sharifan himself (Finding 177 supra.), at the hearing Kane claimed that he had only paid "scant attention" to the transfer documents and that

he had never reached a conclusion in his own mind whether Sharifan was an alien (Tr.3577).[48]

179. On November 20, 1988, Allan Kane and Stan Malecki conversed on the telephone. Kane referred to the alien problem among other things (Tr.3462-3463; CCB Ex.5). Kane further indicated that the possibility that the Commission would even find out about the alien was remote (Tr.3464).[49]

180. In early December 1988, Alee won the lottery for the New Mexico 3 (Catron) RSA. (See Finding 163 supra.). A day or two later they retained William Franklin as their communications counsel. Kane sent Franklin a list of Alee's partners and their occupation. Sharifan was included on the list, but had no occupation listed. At that time Franklin was unaware of the citizenship problem.

181. On December 14, 1988, Kane wrote Franklin. There he discussed the alien ownership problem and recommended that it be fully disclosed to the Alee partners so that they (the partners) would be aware of the risks (Tr.3466-3467). Two days later they talked over the telephone. Among other things they discussed: (1) the possibility of forming Alee II, a partnership without Sharifan; (2) whether or not to disclose

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[48] This testimony borders on the incredible, especially in view of the events that follow infra. It's not necessary to make adverse demeanor findings against Allan Kane to rule on these Kane-managed applicants (Findings 109-110 supra.). But some of these incidents must be called to the appellate body's attention.

[49] This insolent attitude toward the FCC, its policies and its rules permeated this proceeding. The lack of respect for the Commission and its staff was evident in both the attornies and the witnesses. It was disheartening to a government career man of 42 years, the last 35 of which have been with the FCC.

the existence of an alien to the FCC; and (3) Section 22.922's prohibition on alienation of interests in pending applications.

182. Allan Kane felt that Sharifan should be instructed not to respond to any mailings or communications except from Kane as partnership manager. Kane believed that "if we tell the partnership now about the problem, someone will talk about it and [it] could only make it worse [since] this is definitely a violation." (Cf. Finding 178 and Fn.48 supra.).

183. After Alee won the lottery, a partnership meeting was scheduled for December 19, 1988. Before the meeting, Allan Kane called William Franklin, asked him a number of questions and arranged for Franklin to attend the meeting by speakerphone. At the December 19th meeting Sharifan's citizenship problem was discussed. However, the minutes of that meeting only reflect that "confidential matters" and "certain circumstances prevailing in the partnership" were discussed. Allan Kane admits that he was talking in codes, and that this referred to the alien issue (Tr.5908).

184. Before the December 19 meeting, Kane faxed an agenda to Franklin, and he expressed his concern about how to tell the partners about the alien in Alee. Kane says Franklin advised him "to let sleeping dogs lie;" i.e., not to substitute Sharifan with another partner as this would only raise suspicions, and there was no real alternative option to recommend (Tr.3457). This resulted in Kane writing the memo "Loose Lips Sink Ships" (Tr.2563-2564, 6008).

185. At about 9:00 p.m. on December 19, Franklin spoke to the members. He says he offered alternative courses of action, including the alternative that the partnership continue to rely on Sharifan's original questionaire which represents that he is a U.S. citizen (But see Findings 170-171 supra.).

186. Allan Kane says that he isn't sure he told the Alee partners that there really was an alien general partner, but only referred to it as a "possible" problem (Tr.3469).

Nobody agrees with that testimony. John Dolphin attended the December 19, 1988 meeting. He says that the alien's existence was "mentioned as a statement of fact." (Tr.5409-5410). Becky Jo Clark testified that Kane told the partnership that there had been an alien in Alee but that he had been removed. (Tr.6357). Robert Bernstein was well aware of the gravity of the situation the minute Allan Kane revealed the alien's participation. (Tr.5903) Bernstein says the partnership was told that the alien had been substituted with a U.S. citizen (Tr.5905). Alee's partners never discussed the possibility of simply calling Sharifan to ask if he was an alien (Tr.2635).

187. Stan Malecki attended the December 19, 1988 Alee meeting. At one point he testified that not only was the alien issue raised at the meeting, but Kane named the alien, and even represented that Sharifan was indeed not a U.S. citizen (Tr.4573-4575). However, after a recess in the hearing, Malecki testified that he could not state for certain whether Sharifan had been mentioned by name, but Kane did say there was an alien (Tr.4762). Malecki says that there was no doubt in anyone's mind that Sharifan was an alien (Tr.4575).[50]

188. In any event, at the December 19th meeting Alee's partners decided to consider Sharifan as a partner with respect to the New Mexico 3 application. So, despite having information to the contrary, Alee consciously decided to rely on Sharifan's original TCC questionnaire (which he himself did not complete), and to either maintain that he was a U.S.

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[50] There is a basic problem with relying on any of Stan Malecki's testimony. While he appeared to be a lot more reliable than Allan Kane, serious questions have also been raised about Malecki's capacity for truth and veracity. See FCC 91M-3386 released December 4, 1991.

citizen, or if not, that the partnership was unaware of the fact (Tr.2544-2545; CCB Exs.10 and 62 at 1; (Tr.6710).

189. The following day (December 20, 1988), Kane's office billed Sharifan $ 200 for his portion of a capital call (Tr.3445; CCB Exs. 114, 115). After receiving the invoice Sharifan called Kane. He reminded Kane that he was the alien and that he had transferred his interest to Riahi (Tr.6731-6732). Kane told him to pay the $ 200, and to attend future partnership meetings. (Tr.6735, 6751). Sharifan paid the $ 200 capital call. It's never been returned to him (Tr.6735, 6751).[51]

190. Later, in February 1990, Sharifan paid another capital call of $ 1,000. Riahi also paid a $ 1,000 capital call. In this case Sharifan got his money back. On March 19, 1990, Alee's Terry Jones made out a check to Sharifan for $ 1,000. However, the check was not sent out until July 2, 1990 (Tr.652; 11667-11669; CCB Ex.119).

191. On December 28, 1988, Franklin wrote Bernstein. He said (CCB Ex.62; Tr.3480-3481);

> "Per the partnership's decision at its December 19, meeting, we have retained Mr. Sharifan's identification as an Alee partner. In so doing we are relying on the information he initially provided to Alee as to citizenship. As the partnership discussed, this approach creates the risk of dismissal for subsequent applications if this application and its amendment were

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[51] On December 22, 1991, Allan Kane sent a letter to Malecki asking him to get Sharifan to send his $ 200 (CCB Ex.115; Tr.3446, 4566). On December 27, 1988, Malecki wrote Greg Neely asking him for a status report on the Riahi assignment and asking which one (Sharifan or Riahi) should remit the money for the capital call (CCB Ex.56).

> compared to subsequent applications. However, as the partnership discussed on balance this alternative minimizes risk to Alee."[52]

However, Franklin sent this letter to Allan Kane's address. Then Kane gave it to Bernstein (Tr.3481, 5914). Franklin testified that Alee consciously tried to establish a paper trail from Franklin to Bernstein so that it would not appear that Alee had ceded control to Kane "in the FCC sense." (Tr.2567). Kane had asked Franklin to send all Alee correspondence directly to him (CCB Ex.14). Although mail was sent specifically to Bernstein, it was sent "in care of" The Cellular Partnership Management Company operated by Kane (CCB Ex.10).

192. On January 9, 1989, Franklin filed a 47 CFR 1.65 amendment (signed by Bernstein) which listed Shafi Sharifan as an Alee partner (AALA/CFL Ex.158; Tr.5914, 5972). Alee filed other applications with the Commission which list Riahi as an Alee partner and not Sharifan. In Tiers 1 and 2 Sharifan was listed as an Alee partner; in Tier 3 he was not. Bernstein signed these applications and certified that they were accurate (Tr.5973, 5990).

193. On December 16, 1989, Sharifan attended an Alee partnership meeting (CCB Ex.117; Tr.3447, 3572). On January 3, 1990, Sharifan signed a document to rescind the MCRSA (CCB EX.127; Tr.3458, 6746-6747; Finding 166 supra.). In January 1990, Sharifan also signed a document for a change of FCC counsel (CCB Ex. 126; Tr.3488). He got these documents from Allan Kane (Tr.6744). Sharifan

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[52] Alee never reported the September 23, 1988 ownership transfer from Sharifan to Riahi until April 30, 1990 when Hopkins and Sutter advised the Commission of the change (Alee Ex.2, At P4 at 4).

attended[53] another Alee partnership meeting (CCB Ex.118; Tr.3447-3448). He also remembers giving a proxy to Allan Kane on one occasion (Tr.6739-6740).

194. Intermediate Facts. Alee's license for the new Mexico 3 RSA will be revoked. They are not of fit character to remain a Commission licensee. They have willfully violated 47 CFR 22.33(b)(2) of the Commission rules by entering into partial settlement agreements with other nonwireline RSA applicants and licensees.

195. Alee has wilfully violated 47 CFR 22.921 and 22.922, by indirectly amassing and indirectly transferring interests in pending RSA applications. And they have wilfully violated 47 CFR 1.65 by failing to keep their New Mexico 3 (Catron) RSA application accurate and complete in all significant respects. Robert Bernstein certified all of the Alee applications on July 28, 1988. There he certified that there were no understandings or agreements not disclosed in the application which grants anyone else a direct or indirect ownership interest. But at the time he signed he was aware that TCC (his application packager) was planning a "business plan" or "linkage program." Moreover, less than two months later, Bernstein signed the MCRSA on Alee's behalf.

196. Alee entered into the MCRSA. Robert Bernstein, Alee's signing partner partner, signed the MCRSA's Execution Page knowing that he was signing the MCRSA; Allan Kane had told him that his fellow partners had voted in favor of the MCRSA. The other partners had in fact voted in favor of Alee's participation in the MCRSA. Alee's members

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[53] It's passing strange: although Alee has only 14 general partners, none of them seem to know or even are able to identify Shafi Sharafan. Talk about the plague. However, Robert Bernstein remembers meeting Sharafan at one or two meetings (Tr.5919, 5921).

had had the profit sharing concept fully explained to them. They had attended at least two seminars on the subject. They wanted to better their chances of winning in a lottery and guarantee their investments.

197. Alee filed their RSA applications (including New Mexico 3) on August 12, 1988, and entered the MCRSA the following month. Under 47 CFR 1.65 they should have disclosed the MCRSA to the FCC. They not only intentionally failed to disclose the existence of the agreement, they participated in a cover-up not to disclose the agreement to the Commission. This isn't the kind of applicant the Commission and the public have a right to expect.

198. Moreover, there is another independent reason for revoking Alee's application. Alee's partners abdicated the responsibility to a TCC broker, Allan Kane. It was Allan Kane who formed Alee, who was its initial managing partner, who appointed his son-in-law Robert Bernstein to be the signing partner, who promoted the MCRSA, who drew up the ballot for the MCRSA vote, who fostered the concept of Alee finally disclosing the MCRSA's existence to the FCC, and who spearheaded Alee's recission of the MCRSA.

199. Finally, Alee was in violation of *47 USC 310*(b) at the time they filed their application. One of their partners was an alien, Shafi Sharifan. The participation of an alien general partner is a major defect that cannot be cured by amendment. See *Continental Cellular 6 FCC Rcd 6834 (1991).* Alee (actually Kane, Malecki and company) recognized their predicament. So they fomented a cover-up. They knew Sharifan was an alien, but they filed a 47 CFR 1.65 amendment that represented to the Commission he was a

U.S. citizen. A deceit, pure and simple.[54] Alee lacks character.

200. So even if Alee hadn't wilfully and deliberately violated the Commission's partial settlement rules, and even if they hadn't abdicated control over their application, they would still be revoked for violating *47 USC 310*(b) and then lying about it.[55]

201. In mitigation Alee claims that "[s]ince Alee received a construction permit, we constructed and are currently operating the cellular system in RSA Market No. 555A, New Mexico 3." This assertion is not persuasive. If Alee is contending that it has sunk a considerable amount of money into the New Mexico 3 RSA operation, the record doesn't support it. In fact, there is no proof that Alee has any subscribers of its own but is only providing, at most, roamer service. (Alee Ex.1; Alee Ex.3; Alee Ex.5; Tr.6399). Since there is no showing that Alee is furnishing any substantial service to the public, their mitigation assertion is summarily rejected. Their New Mexico 3 (Catron) RSA will be revoked.

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[54] As TCC President Greg Neely puts it, they (Alee) "ran Sharifan right through the Commission." (Tr.1931).

[55] In addition, Alee represented that one of its general partners was Kandace Dolphin. She wasn't. The true partner was Cellular Dreams. William Franklin admits that this should have been disclosed in a 47 CFR 1.65 amendment he filed in 1989 (Tr.2642). Further during the fall of 1988, Alee also transferred Agnes Jones' partnership interest in Alee to Mobile Bell Communications in violation of 47 CFR 22.922 (Finding 177 supra). This lack-of-candor demonstrates that Alee is an applicant not worthy of mitigation.

Conclusions of Law

1. This Initial Decision is the compulsory but unfortunate chronicle of a less-than-scrupulous RSA cellular application vendor, The Cellular Corporation (TCC). Using artful and disingenuous brokers (Alan Kane, Doc Scott etc.) TCC presold over 11,500 RSA cellular applications to some 341 investors.[156] They sold those applications under the fallacious representation that the buyer would be able to enter into post-filing, pre-lottery partial settlements called "alliances." TCC and their brokers even went so far as to represent that even if (as rumored) the FCC did away with alliances (which had previously been allowed during the MSA cellular allocation process), TCC would implement a "business plan," a plan that would achieve the same results as alliances.

2. Shortly thereafter the FCC did conclude that alliances and the results stemming from such alliances substantially hindered the proper processing and appropriate allocation of cellular applications. So the Commission passed a new set of rules, rules that did away with alliances and partial settlements.

3. TCC and their brokers were then faced with the prospect of returning the presold funds to their many RSA investors.

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[156] The 21 captioned applicants and licensees are made up of 341 investors. But many of those investors are themselves partnerships made up of numerous individuals. Moreover, some of the signatories to both the East Coast and West Coast MCRSAs didn't win any lotteries. So they were not made parties to the proceeding. But (as signatories to the risk-sharing agreement) they will be affected by the results of this decision. In addition 21st Century Cellular and Edison Cellular are no longer parties to this proceeding. Also TCC and their brokers postsold RSA cellular applications. All in all the number of individual investors impacted by TCC's premature and fallacious representations probably exceeds 1000.

Neither TCC's president, Greg Neely, nor TCC's brokers wanted to return those monies. Moreover, the record reflects that since substantial amounts of money were involved, neither TCC nor many of their brokers had the financial wherewithal to reimburse their individual investors. So, with full knowledge of the many complexities and risks involved, they opted to develop and implement a "business plan" designed to achieve the same results as alliances. The plan they implemented (Mutual Contingent Risk Sharing Agreements - MCRSAs) embodied partial settlements and required the filing of a flood of speculative applications (428 per applicant or licensee). These were the very allocation abuses the Commission was bent on eliminating. See Findings 12-14 supra.).

4. Stated simply, rather than return the money to their investor-clients, TCC and their brokers embarked on an elaborate plan to circumvent the Commission's newly developed RSA rules against alliances and partial settlements; i.e., 47 CFR 22.33, 47 CFR 22.921, 47 CFR 22.922, 47 CFR 22.923(b)(7). They embarked on this plan deliberately. They embarked on this plan wilfully.

5. Why they believed they could pull off such a massive scam remains a mystery. Perhaps it was because it was such a huge undertaking they thought the Commission would back off from its newly promulgated RSA rules. In any event TCC realized that an essential link in their circumvention plan involved concealing the existence of the MCRSAs from the FCC. TCC's then attorney, William Franklin, had advised them that there was no need for these partnerships to report to the FCC that they were a signatory to a multilateral partial settlement agreement. He even estimated that there was a 50% chance that the risk sharing agreements would never be called to the FCC's attention. Even if they were,

said Franklin, the chances were very good the Commission would do nothing about it.[157]

6. Franklin's estimate proved faulty and his advice bad. Given the size and complexity of the Commission's RSA cellular allocation effort, given the number of participants in that effort (including other competing application vendors), and given the large number of signatories to the multilateral partial settlement agreements, it was sheer folly for TCC et. al. to believe that the existence of such agreements could remain a secret for any length of time.

7. But for well over a year TCC and their brokers did not disclose the existence of the MCRSAs to the FCC. And it was only under pressure from the Washington, D.C. law firm of Brown, Finn, and Neitert, that TCC's President Greg Neely and the TCC's brokers decided to come clean.[158]

8. At this juncture, one might be tempted to feel sorry for the investors who were lured into participating in TCC's attempt to circumvent the Commission's ban on partial settlements. Such sympathy would be misplaced. Most of the key

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[157] Franklin, as well as many other cellular attorneys, apparently believed that the FCC lacked the regulatory backbone to enforce their partial settlement prohibition. He felt that the Commission would blink at RSA cellular rules infractions. So he openly advised the TCC-prepared partnerships to keep decisionally significant facts from the Commission. For example, he tacitly advised Alee Cellular Communications not to tell the FCC that one of its partners was an alien (See Finding 184 supra.).

[158] Only one of the 21 applicants and licensees involved here have seriously asserted that it ". . . is not now and never has been a party to the [MCRSA] agreement." That was Alpha Cellular. That assertion proved totally spurious. As one of Alpha's partners, Bob Chapman, said to TCC executive and broker Tye St.James: "What happens when we get that construction permit in our hot little hands, . . . and then the FCC finds out about our linked partnerships?"

individuals in these 21 partnerships; i.e., signing partners, managing partners etc., were fully aware of the breadth and terms of the scam TCC was attempting to perpetrate. In fact the conclusion is warranted that almost all of the partners in each of the 21 partnerships were fully cognizant of TCC's efforts to implement an RSA "business plan" that would achieve the same results as the MSA alliances, and they willingly participated in that implementation.

9. Moreover, the 21 applicants and licensees selected a few representative partners to testify on their own behalf in this proceeding. So the Trial Judge was given an evidentiary snapshot of the partnership's equity holders. Based on his observations of the demeanor of those representative witnesses, the Trial Judge concluded that for the most part[159] the individual partner witnesses were a grasping, penurious lot, a sorry bunch of witnesses. They were perfectly willing, indeed anxious, to bend the truth and/or lie outright if they even suspected it would benefit them financially. More importantly, they appeared anxious to find a scapegoat (with money of course) that they could blame for their own shortcomings. The targeted scapegoat turned out to be attorney William Franklin of Pepper and Corazzini.[160] But

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[159] Some of the partnership witnesses proved creditable. Certainly Richard Flippin, Allan K. Hammell, Eugene Litten, Dorothy Roberts, and even Edward J. Massey (a TCC broker) appeared to have taken their oath seriously at the administrative hearing level.

[160] As previously noted (Conclusion 3 supra.) neither TCC nor its brokers have the financial wherewithal to reimburse the individual partner investors. So they would make poor scapegoats. Moreover, it was William Franklin who included the exculpatory clauses in the MCRSAs (Paras. 8-4 through 8-6) that protected TCC and its brokers from the investing partners. See Findings 60 and 69 supra. Accordingly, the individual partners of Centaur Partnership, Pinellas Communications, JayBar Communications, and Bay Cellular have brought a lawsuit against Pepper and Corazzini (William Franklin) in the United States District

(continued...)

as the findings supra. show, the partnerships involved failed to transfer blame for their own wrongdoing.

10. The partner-investor witnesses in this case are unlike listeners in a comparative broadcast case, or telephone users in a common carrier rate case. These investor-witnesses are speculators, and they performed like speculators. They wore their greed on their sleeve.

11. It must be emphasized that the Commission has treated these 21 applicants and licensees in a more than fair manner. Even after the Commission learned that all 21 had willingly joined in the conspiracy to bypass the newly developed RSA allocation rules, they didn't throw them into hearing (as some itinerant trial judge might want to do). Instead the Commission's Common Carrier Bureau conducted a thorough investigation into the past activities of all 21 (MSD 90-5). It was only after the Bureau was faced with incontrovertible facts about the duplicity of all 21 that they designated them for hearing.

12. We've held a full trial type hearing. We've examined some 600 written exhibits and heard from some 57 witnesses. With one exception the Trial Judge has strictly followed the Hearing Designation Order's trial instructions. That one exception relates to the topic of mitigation. The Bureau Chief took the position that mitigation evidence

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(..continued)
Court for the District of Columbia. They are suing for in excess of $ 25 million plus costs and reasonable attorney fees. Also EJM Cellular Partners are suing Pepper and Corazzini in the Superior Court for the District of Columbia. They are suing for in excess of $ 6 million plus costs and reasonable attorney fees. See Motion to Supplement the Record filed by Pepper and Corazzini on February 11, 1992, and FCC 92M-251 released February 26, 1992.

should not be adduced because "evidence of mitigation is not pertinent."

13. The Trial Judge ruled that any applicant or licensee could present any relevant mitigation evidence they saw fit. He did so for three basic reasons. First, he doesn't want the Court of Appeals to rule that it was arbitrary and capricious to preclude an applicant from presenting evidence of mitigating factors. Administrative hearings are a search for the whole truth. If part of that whole truth is the existence of relevant mitigating circumstances, so be it. Let's look at it and weigh it accordingly.

14. Secondly, the administrative appellate bodies; i.e., the Review Board and ultimately the full Commission should have the whole truth before them before arriving at their decisions.

15. Third, and finally, if any or all of these 21 applicants and licensees have deliberately flaunted the Commission's RSA cellular rules (and it now appears that they have), but there is a valid reason for having done so, we would be remiss not to have that reason as part of the evidentiary record. Elementary fairness demands it.

16. Analyzing the evidence adduced during this substantial hearing (Conclusions 1-15 supra.) the following Summary chart has been constructed. The chart capsulizes the evidentiary record for each of the 21 applicants and licensees and is designed to give the reader a picture of the scope of the evidence adduced on each.

CHART

	47CFR 22.33	47CFR 22.921	47CFR 22.922	47CFR 22.923 (b)(7)	47CFR 1.65	Abuse of Process	Mitigation Plea	Other Violations
A-1 Cellular	V	V	V	V	V	NA	C	0
Cranford Cellular	V	V	V	V	V	NA	C	V n1
New Era Cellular	V	V	V	O	V	NA	C	V n1
Alee Cellular	V	V	V	O	V	NA	C	V n2
TNT Communications	V	V	V	V	V	NA	C	O
Cel-Tel Communications	V	V	V	V	V	NA	C	O
Algreg Cellular Engineering	V	V	V	V	V	NA	C	O
Jaybar Communications	V	V	V	V	V	NA	C	O
Pinellas Communications	V	VV	V	V	V	NA	C	O
Florida Cellular	V	V	V	O	V	NA	C	O
Bay Cellular of Florida	V	V	VV	VV	V	NA	C	O
Centaur Partnerships	V	V	V	V	VV	NA	C	V n3
EJM Cellular	V	V	V	O	V	NA	C	V n2
Data Cellular Systems	V	V	V	V	V	NA	C	V n4
Satellite Cellular	V	V	V	V	V	V	C	V n4
Signal Cellular	V	V	V	V	V	NA	C	O

Crystal Communications	V	V	V	O	V	V	C	O
Cellular Pacific	V	V	V	V	V	V	C	O
North American Cellular	V	V	V	V	V	V	C	O
Bravo Cellular	V	V	V	V	V	NA	NA	V
Alpha Cellular	V	V	V	VV	V	NA	NA	O

V = Violation; VV = more than one violation; NA = not applicable; O = No violation found;
C = Considered but rejected

n1 Abdication of control violation.

n2 Alien ownership violation

n3 False or incomplete ownership structure.

n4 Ex Parte Violation.

17. Based on the Findings of Fact (Findings 1-700 supra.), and the above Chart (Conclusion 16 supra.), certain further conclusions are warranted.

18. By entering into the Mutually Contingent Risk Sharing Agreements (MCRSAs) every one of the 21 applicants and licensees violated 47 CFR 22.33(b)(2). That rule prohibits partial settlement agreements among nonwireline applicants. This violation alone mandates denial of their applications and/or revocation of their construction permits.

19. By entering into the MCRSAs every one of the 21 applicants and/or licensees have violated both 47 CFR 22.921 (which prohibits any direct or indirect ownership interest in more than one RSA application for the same market) and 47 CFR 22.922 (which prohibits the transfer of interests in RSA cellular applications). Either of these two violations standing alone mandates denial of their applications and/or revocation of their construction permits. In addition, both the chart and the findings demonstrate that one of the applicants, Pinellas Communications is guilty of two 47 CFR 22.921 violations, and Bay Cellular of Florida is guilty of two 47 CFR 22.922 violations.

20. By entering into the MCRSAs and then failing to timely report this decisionally significant event to the Commission every one of the 21 applicants and licensees have violated 47 CFR 1.65; i.e., they have failed to keep their RSA applications complete and accurate. The record also supports the conclusion that these 1.65 violations were deliberate and egregious. Therefore such violations standing alone mandate denial of their applications and/or revocation of their licenses. By failing to timely file a 47 CFR 1.65 amendment, they left the Commission process thousands and thousands of applications that would not have otherwise needed to be processed.

21. Next, the record demonstrates that all but five of these 21 applicants and licensees have falsely certified their RSA applications in violation of 47 CFR 22.923(b)(7). However, the applicants' and licensees' opponents failed to make false certification cases against New Era Cellular, Alee Cellular, Florida Cellular, EJM Cellular, and Crystal Communications. On the other hand the record also demonstrates that Bay Cellular of Florida and Alpha Cellular are guilty of more than one 22.923(b)(7) false certification. Falsely certifying an initial application is a grass roots violation. It strikes at the very heart of the Commission's allocation processes. Such basic deception forms still another independent reason for denying the sixteen transgressors.

22. In addition to the in-common issues that the Chief, Common Carrier Bureau designated against all 21 applicants and licensees, the Chief also designated a *47 USC 310*(b) alien ownership and lack of candor issues against Alee Cellular. See Finding 6 supra., Issues L-4 and L-5. Those issues will be decided adversely to Alee. One of Alee's original partners, Shafi Sharifan was an alien. See Findings 151(13) and 168-193 supra. Accordingly, their application should have been dismissed ab initio, and would have been had the Commission known. However, when Alee discovered that Shafi Sharifan was an alien they tried to conceal that fact from the Commission. The concealment was spearheaded by TCC broker Allan Kane. So issues L-4 and L-5 are decided adversely to Alee and form still another independent reason for revoking Alee's license for the New Mexico 3 (Catron) RSA.

23. The Trial Judge also added abuse of process issues against four of the 21; i.e., Satellite Cellular, Crystal Communications, Cellular Pacific and North American. See Finding 9 and Issue L-7 supra. The record shows that these four have abused the Commission's discovery processes.

They deliberately thwarted legitimate inquiries into their cellular application activities by refusing to comply with valid document discovery requests and/or by complying in such an untimely manner as to nullify the effectiveness of the request. This type of an abuse, especially in a proceeding of this size and complexity, cannot be tolerated. Issue L-7 is decided adversely to the four, and it is concluded that they are not basically qualified to be Commission licensees.

24. Since it has been determined that Satellite Cellular, Crystal Communications, Cellular Pacific, and North American have all abused the Commission's process, the Notice of Forfeiture at FCC 91M-3213, released November 5, 1991 becomes operable. It is concluded that Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications have each abused the Commission's discovery processes thus violating 47 CFR 1.311 and 47 CFR 1.325. Consequently each will be assessed a forfeiture of $ 25,000.

25. As previously noted (Conclusions 12-15 supra.), the Trial Judge ruled early-on that any or all of the 21 applicants and licensees could present mitigating evidence if they chose to do so. Nineteen of the 21 made half-hearted, poorly-presented stabs at presenting a case in mitigation. None of those efforts came close to being convincing and consequently were rejected.

26. As generally happens in a case of this size and complexity, during the course of the hearing it developed that some of the applicants and licensees had violated other non-designated Commission rules. The Trial Judge did not stop the hearing each time one of these violations was uncovered, and add an issue or issues for further trial. If he had, we'd still be in hearing. Instead he allowed the evidence on these additional violations to be developed and used for anti-mitigation purposes. In other words, if any of the violating applicants or licensees had presented a reasonably persuasive

case in mitigation (which they didn't) their opponents had the right to refer to the non-designated violations and argue that these applicants or licensees are not entitled to equity since they did not seek equity with clean hands.

27. A summary of these additional non-designated violations follow. Bravo Cellular and Centaur Partnership, ab initio, submitted false or incomplete ownership structures to the Commission. As previously noted (Findings 621-623 supra.) it is essential to any allocation scheme (even a lottery) that the allocator knows exactly who is being granted and who is being denied. That's about as basic as you can get. So the failure to give the Commission accurate ownership data to process is fundamentally fatal.

28. Next, and like Alee supra., EJM Cellular violated *47 USC 310*(b) by filing 428 RSA applications with an alien as part of their ownership structure. This is another fundamental ownership flaw.

29. The record shows that the Cranford Cellular and New Era partners completely abandoned control over their respective partnerships and turned over the reins to TCC broker, Allan Kane. Kane exercised complete control over their partnership affairs.[161] Abdication of control undoes the allocation process. When a party applies for a franchise both the Commission and the public have the right to expect that party (not someone else) to prosecute that application and, if granted, to control and operate that franchise. Any other approach makes a mockery out of the allocation process.

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[161] It could be plausibly argued that 20 of the 21 applicants and licensee (sans Algreg Cellular Engineering) abdicated control of their partnership affairs to TCC. Algreg, a sole proprietorship, is owned by Greg Neely, TCC's president.

30. Finally, both Data Cellular Systems and Satellite Cellular tried to influence the outcome of this adjudication by improper means. They solicited ex parte presentations from outside sources; namely, some 28 members of Congress. These multiple and flagrant violations of 47 CFR 1.1210 cannot and should not pass unnoticed. They eat at the very heart of our system of government-due process, fair play, open proceedings, unbiased, uninfluenced decisions. So even if Data Cellular and Satellite Cellular had staked out a reasonable mitigation position (which they did not), their lack of clean hands would preclude them from equitable consideration.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on their own motion, A-1 Cellular Communications' applications for the Texas 10 (Navarro) RSA (File No. 10409-CL-P-661-A-89) and the Missouri 11 (Moniteau) RSA (File No. 10454-CL-P-514-A-89) ARE DENIED;

Cranford Cellular Communications' application for the Alabama 5 (Cleburne) RSA (File No. 10611-CL-P-311-A-89) IS DENIED;

New-Era Cellular Telecommunications' application for the Arkansas 9 (Polk) RSA (File No. 40563-CL-P-332-A-89) IS DENIED;

Alee Cellular Communications' construction permit for the New Mexico 3 (Catron) RSA (File No. 10074-CL-P-555-A-88) Station KNKN 271 IS REVOKED;

TNT Communications' applications for the North Dakota 3 (Barnes) RSA (File No. 10233-CL-P-582-A-89) and the Puerto Rico 5 (Ceiba) RSA (File No. 10678-CL-P-727-A-89) ARE DENIED;

Cel-Tel Communications' application for the Ohio 5 (Hancock) RSA (File No. 10912-CL-P-589-A-89) IS DENIED;

Algreg Cellular Engineering's application for the Alabama 1 (Franklin) RSA (File No. 10607-CL-P-307-A-89) IS DENIED;

Jaybar Communications' construction permit for the Arizona 6 (Graham) RSA (File No. 10042-CL-P-323-A-88) Station KNKN 251 IS REVOKED;

Pinellas Communications' application for the Pennsylvania 2 (McKean) RSA (File No. 10808-CL-P-613-A-89) IS DENIED;

Florida Cellular's application for the Missouri 2 (Harrison) RSA (File No. 10445-CL-P-505-A-89) IS DENIED;

Bay Cellular of Florida's application for the Mississippi 5 (Washington) RSA (File No. 10754-CL-P-497-A-89) IS DENIED;

Centaur Partnership's application for the South Carolina 7 (Calhoun) RSA (File No. 10720-CL-P-631-A-89) IS DENIED;

EJM Cellular Partners' applications for the Oklahoma 1 (Cimarron) RSA (File No. 10567-CL-P-596-A-89) and the Wyoming 4 (Niobrara) RSA (File No. 10116-CL-P-721-A-89) ARE DENIED;

Data Cellular Systems' construction permit for the California 10 (Sierra) RSA (File No. 10029-CL-P-345-A-88), (File No.07080-CL-MP-91) Station KNKN 250 IS REVOKED;

Satellite Cellular Systems' construction permit for the Arizona 1 (Mohave) RSA (File No. 10037-CL-P-318-A-89) Station KNKN 268 IS REVOKED;

Signal Cellular Communications application for the South Carolina 8 (Hampton) RSA (File No. 10721-CL-P-632-A-89) IS DENIED;

Crystal Communications Systems' construction permit for the Oregon 1 (Clatsop) RSA (File No. 10078-CL-P-606-A-88) Station KNKN 309 IS REVOKED;

Cellular Pacific's construction permit for the California 11 (Eldorado) RSA (File No. 10031-CL-P-346-A-88), (File No. 06606-CL-MP-90), (File No. 06688-CL-MP-90) Station KNKN 252 IS REVOKED;

North American Cellular's construction permit for the Idaho 1 (Boundary) RSA (File No. 10066-Q-P-388-A-88) Station KNKN 253 IS REVOKED;

Bravo Cellular's application for the North Carolina 15 (Cabarrus) RSA (File No. 10673-CL-P-579-A-89) IS DENIED;

Alpha Cellular's Application for the Ohio 2 (Sandosky) RSA (File No. 10909-CL-P-586-A-89 IS DENIED; their construction permit for the Indiana 8 (Brown) RSA (File No. 10318-CL-P-410-A-88) Station KNKN 340 IS REVOKED; and their application to assign Station KNKN 340 (File No. 10318-CL-P-410-A-88) IS DISMISSED as moot;

Satellite Cellular Systems IS FINED $ 25,000;

Crystal Communications Systems IS FINED $ 25,000;

Cellular Pacific IS FINED $ 25,000; and

North American Cellular IS FINED $ 25,000.[162]

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[162] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller

Administrative Law Judge

APPENDIX E

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 99-1460

September Term, 2000
Filed April 5, 2001

Alee Cellular Communications,
Appellant

v.

Federal Communications Commission,
Appellee

Alabama Wireless, Inc., f/k/a Algreg Cellular Engineering,
Intervenors

BEFORE: Edwards, Chief Judge, Ginsburg and Randolph, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed March 15, 2001, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX F

5 U.S.C. § 557

UNITED STATES CODE ANNOTATED

TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I. THE AGENCIES GENERALLY
CHAPTER 5. ADMINISTRATIVE PROCEDURE
SUBCHAPTER II. ADMINISTRATIVE PROCEDURE

CURRENT THROUGH P.L. 107-15, APPROVED 6/5/01

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the

evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis

therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d) (1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

APPENDIX G

47 U.S.C. § 312

UNITED STATES CODE ANNOTATED

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SPECIAL PROVISIONS RELATING TO RADIO
GENERAL PROVISIONS

CURRENT THROUGH P.L. 107-15, APPROVED 6/5/01

§ 312. Administrative sanctions

(a) Revocation of station license or construction permit. The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Cease and desist orders. Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Order to show cause. Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear here before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the

Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) Burden of proof. In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) Procedure for issuance of cease and desist order. The provisions of section 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

(f) Definition of "willful" and "repeated". For purposes of this section:

(1) The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

(2) The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once

or, if such commission or omission is continuous, for more than one day.

(g) If a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary.

No. 01-15

In the Supreme Court of the United States

ALEE CELLULAR COMMUNICATIONS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the Federal Communications Commission's revocation of a license because of lack of candor on the part of the applicant, based on the court's finding that the Commission's determination was supported by substantial evidence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Be-Lo Stores v. *NLRB*, 126 F.3d 268 (4th 1997)	12, 13
Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962)	15
Consolidated Edison Co. v. *NLRB*, 305 U.S. 197 (1938)	15
Metropolitan Stevedore Co. v. *Rambo*, 521 U.S. 121 (1997)	15
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	15

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 706(2)(E)	14
Communications Act of 1934, § 310(b)(3), 47 U.S.C. 310(b)(3) (1988)	2, 3, 4
Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(k)(1), 110 Stat. 131	4
47 C.F.R.:	
Section 1.65 (1989)	2, 3
Section 1.65(a) (1989)	2
Section 22.43	2

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is unreported. The opinion of the Federal Communications Commission on reconsideration, released Oct. 18, 1999 (Pet. App. 4a-29a) is reported at 14 F.C.C.R. 18,524, and the Commission's initial opinion, released June 3, 1997 (Pet. App. 30a-97a) is reported at 12 F.C.C.R. 8148. The decision of the Review Board is reported at 9 F.C.C.R. 5098. The decision of the administrative law judge (reprinted in part at Pet. App. 98a-160a; see Pet. 2 & n.1) is reported at 7 F.C.C.R. 8686.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2001. A petition for rehearing was denied on April 5, 2001 (Pet. App. 161a). The petition for a writ of certiorari was filed on July 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Beginning in the 1980s, the Federal Communications Commission (FCC or Commission) distributed cellular telephone licenses by lottery. In December 1988, petitioner, a general partnership with 14 partners, won a license to provide service in New Mexico. Pet. App. 67a.

At the time of petitioner's application in 1988, one of its general partners, Shafi M. Sharifan, was not a United States citizen. Petitioner's application did not disclose that fact. If petitioner had informed the Commission that one of its general partners was an alien, its application would have been "summarily dismissed" because, "at the time of the events in question, section 310(b)(3) of the Communications Act and [47 C.F.R. 22.43] expressly prohibited the grant of a common carrier radio license to a corporation with any alien officer or director, and the Commission had treated the position of a general partner as being comparable to that of a corporate officer or director." Pet. App. 72a-73a; *id.* at 154a; see 47 U.S.C. 310(b)(3) (1988).

After petitioner won the lottery for the New Mexico license, it filed an amendment to its application on January 9, 1989, under Section 1.65 of the Commission's rules, 47 C.F.R. 1.65, which states that "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall * * * amend

* * * his application so as to furnish such additional or corrected information as may be appropriate." 47 C.F.R. 1.65(a) (1989). Petitioner's amendment listed Sharifan as a partner and inaccurately stated that all of petitioner's partners were United States citizens. Pet. App. 67a.

Eventually, in a letter dated April 30, 1990, petitioner advised the Commission that the initial applications that it had filed in August 1988 listed a general partner who was an alien. Pet. App. 67a. In that letter, petitioner also claimed that the alien's partnership interest had been transferred to a United States citizen on September 23, 1988. *Ibid.* The Section 1.65 amendment that petitioner filed in January 1989 had failed to disclose any such transfer, however. The amendment stated that none of the changes in the application made any change to the partnership and that there was "no change in the ownership previously identified in the application." *Id.* at 75a. In addition, Sharifan had continued after September 1998 to participate as a partner in petitioner's activities. *Id.* at 140a-142a.

b. Upon learning of an alien's involvement in the petitioner partnership, the FCC's Common Carrier Bureau designated the matter for a revocation hearing to determine if petitioner "lacked candor in failing to reveal that it had an alien general partner or that there had been a change in its ownership structure." Pet. App. 67a (citing *Hearing Designation Order*, 6 F.C.C.R. 2921 (CCB 1991)). At the conclusion of that hearing, the Administrative Law Judge (ALJ) found that petitioner was in violation of 47 U.S.C. 310(b)(3) (1988) at the time it filed its application. Pet. App. 143a. The ALJ also found that petitioner "recognized their predicament," but nonetheless filed an amendment under 47 C.F.R. 1.65 (1989) that represented to the

Commission that petitioner's alien partner was a United States citizen, which the ALJ found to be "[a] deceit, pure and simple." Pet. App. 143a-144a (footnote omitted). The ALJ concluded that petitioner's license should be revoked because petitioner violated Section 310(b)(3) and because petitioner lied about it and tried to conceal the fact from the Commission. *Id.* at 144a, 154a.

The ALJ rejected petitioner's mitigation claim, finding that the record did not support the claim that petitioner had invested a considerable amount of money in the New Mexico operation and concluding that there was no showing that petitioner was furnishing a substantial service to the public. Pet. App. 144a. Accordingly, the ALJ ordered that petitioner's license for the New Mexico station be revoked. *Id.* at 154a.[1]

The Commission's Review Board agreed with the ALJ's revocation of petitioner's license based on petitioner's violation of Section 310(b)(3), and did not reach the candor issue. 9 F.C.C.R. 5098, 5147 (1994).

2. a. The Commission affirmed the ALJ's determination that petitioner lacked candor and revoked petitioner's license.[2] Pet. App. 62a. The Commission recog-

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[1] The ALJ (Pet. App. 153a-154a) and the Board (9 F.C.C.R. 5098) concluded that revocation of petitioner's license, along with the licenses of several other applicants, was warranted on other grounds as well, related to their participation in a risk-sharing arrangement at the time of their applications. The Commission granted various applications for review on that issue, however, and terminated revocation proceedings based on that ground. Pet. App. 33a.

[2] The Commission did not affirm the revocation of petitioner's license based on petitioner's initial violation of 47 U.S.C. 310(b)(3) (1988), because that statutory prohibition against alien officers and directors was removed by Section 403(k)(1) of the Telecommunica-

nized that, in light of the resolution of other issues against petitioner, the Board did not have occasion to address the candor issue but, nonetheless, had correctly found that the ALJ erroneously placed the burden of proof on the licensees rather than the government. *Id.* at 67a, 71a. Accordingly, the Commission "independently reviewed the record under the correct burden of proof." *Id.* at 71a.

Based on a detailed examination of the record evidence (Pet. App. 66a-81a), the Commission concluded that a preponderance of the evidence established that petitioner was aware that one of the general partners was an alien, understood the relevance of the information, and deliberately withheld the information from the Commission. See *id.* at 72a-81a. In particular, the Commission found that petitioner's signing partner and largest equity holder, Robert Bernstein, knew, when he signed the January 1989 amendment for filing with the Commission, that having an alien partner would adversely affect petitioner's chance of getting the construction permit for which it applied after it was selected in the lottery, and that the relevant information in the amendment was false. *Id.* at 71a.

The Commission relied on testimony by attorney William Franklin regarding a December 19, 1998, meeting of petitioner's partnership at which the matter of the alien partner was discussed. Franklin testified that the partnership decided at the meeting to continue to rely on Sharifan as a partner and on the question-

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tions Act of 1996, Pub. L. No. 104-104, § 403(k)(1), 110 Stat. 131. The Commission determined that, in light of the change in the law, the public interest would not be served by revocation of petitioner's license based on the alien ownership violation, itself. Pet. App. 64a-66a.

naire originally submitted to the FCC that erroneously listed him as a United States citizen. Pet. App. 68a. The partners, including Bernstein, conceded that they were told at the meeting that there was an alien partner, but they claimed that they were told by Franklin and the partnership's manager that the alien had been removed. *Id.* at 67a, 69a-70a, 139a.

Thus, Bernstein claimed that, when he signed the false amendment in January 1989, he relied on the assurance of Franklin and the partnership's manager that the alien partner problem "had been taken care of." Pet. App. 73a. The Commission specifically found that this claim by Bernstein was "not credible nor supported by the record." The Commission first noted that, at the time Bernstein signed the false January 1989 amendment, it would not have been reasonable for Bernstein to rely on Franklin "to supply accurate ownership information" because that information was not "a complicated legal question" and because Franklin had not represented the partnership at the time that the initial application was filed. *Id.* at 75a n.4. Moreover, the Commission found that, "[e]ven assuming Bernstein did not know the names of the partners, he would have realized something was wrong when he read the amendment," which he signed to certify the truthfulness of the information it contained. *Id.* at 75a. The Commission explained that, "[i]f, as Bernstein claims, he was told that the alien problem was 'fixed' by substituting a new non-alien partner, signing an amendment stating that there was no change in [petitioner's] ownership should have given him pause." *Id.* at 76a. Moreover, "if Bernstein compared the names on the amendment with those on the partnership agreement, he would have discovered that the names matched. This would have alerted him to the fact that, despite

the ownership change supposedly effected to 'fix' the alien problem, the amendment included the name of the original alien partner (rather than the substitute partner). At that point, he would have also realized that the amendment's representation concerning the partners' citizenship was wrong." *Ibid.* The Commission concluded that, "[u]nder these circumstances, it is simply not credible that," if Bernstein had been informed at the December partnership meeting that "the alien problem was 'taken care of' by replacing the alien partner * * *, he would have signed an amendment less than one month later that states there is no change in ownership without focusing on the alien matter or on the ownership change effected by the substitution." *Ibid.* The Commission also found it not credible that Bernstein failed to talk to the partnership manager about the alien partner after the December meeting. *Ibid.*

The Commission noted that the only record evidence that supported Bernstein's "self-serving version" of what happened at the December partnership meeting was the testimony of two of Bernstein's partners. Pet. App. 76a. The Commission chose to rely on Franklin's contrary testimony instead, based on the Commission's evaluation of "the credibility of Franklin vis-a-vis that of [petitioner's] three testifying partners." *Id.* at 77a. The Commission concluded that the partners had a motive to misrepresent the agreement they reached at the December meeting, but that Franklin, who had not represented petitioner when it filed its initial application that included the alien partner, did not have a comparable motive to misrepresent the partners' agreement and did not have any reason to conceal from the partners the alien problem or how it was resolved. *Ibid.* The Commission rejected petitioner's challenge to

Franklin's testimony as internally inconsistent, finding that the ambiguity in his testimony did not affect his testimony about the December meeting and did not require rejection of that testimony. *Id.* at 77a-78a.

The Commission also found that "a host of documentary evidence" supported Franklin's testimony. Pet. App. 78a. First, the Commission relied on a December 28, 1998, letter from Franklin to Bernstein that accompanied the draft amendment and discussed the partnership's decision at the December 19 meeting to continue to identify Sharifan as a partner, the partnership's discussion of various risks that the application would be dismissed, and the decision that "on balance this alternative minimizes risk" to petitioner. The Commission reasoned, *inter alia*, that "[i]t is unclear why Franklin would have written such a letter if, as [petitioner] claims, the partners never agreed to retain the identification of Sharifan as a partner." *Ibid.* Second, the Commission pointed to the fact that, although the partners testified that each of them learned of the alien partner issue at the December 19 partnership meeting, the minutes of that meeting did not mention any discussion of the alien matter, but indicated that there was a discussion of "confidential matters." *Id.* at 79a. The Commission reasoned that there would have been no reason for secrecy if, as Bernstein and the other partners testified, they were informed by Franklin and the partnership manager that substituting the non-alien partner resolved the matter. *Ibid.* Third, the Commission cited the notes of a telephone conversation between Franklin and the partnership manager about how to present the alien partner problem to the partners at the December meeting. The notes indicated that Franklin's advice was to disclose to the partners the entire situation and have the partners vote on the

desired course of action which, in Franklin's view, would be to let matters lie and hope that no one discovered the alien problem. *Id.* at 79a-80a.

Finally, the Commission noted that, in addition to the documentary evidence that belied the partners' self-serving testimony, the ALJ had made adverse credibility findings as to the three partners who testified. The Commission explained that the ALJ had concluded that the partners who testified on behalf of the applicants and licensees involved in the consolidated proceeding were "perfectly willing, indeed anxious, to bend the truth and/or lie outright . . . . [and] to find a scapegoat (with money of course) that they could blame their troubles on." Pet. App. 80a (citation omitted). With respect to one of petitioner's partners, the ALJ specifically found that, "put in its most charitable light her testimony was less than persuasive." *Ibid.* The Commission found no basis for disregarding those findings, which it noted were "entitled to decisional deference unless those findings irreconcilably conflict with the record evidence." *Ibid.* (citation omitted). The Commission expressly recognized that the findings "do not single out [petitioner's] three testifying partners," but found it significant that the ALJ made the credibility findings "in the context of the partnerships' efforts to blame all of their legal troubles on Franklin," which the Commission noted was "precisely the defense [petitioner] invoked here." *Ibid.* The Commission also found that, for the reasons already discussed, the ALJ's credibility findings "are not in conflict with the record evidence." *Ibid.*

The Commission rejected petitioner's argument that its voluntary reporting of the alien matter to the Commission in April 1990 undermined any intent to deceive the Commission. Pet. App. 80a-81a. The Commission

noted that, even assuming petitioner did not discover the erroneous listing of the alien partner in the 1989 amendment until 1990, petitioner delayed four months before informing the Commission about the error. Moreover, when petitioner did inform the Commission, it failed to disclose that the alien partner continued to participate in partnership matters after the purported transfer of his interest to a citizen partner before the September 1988 lottery. *Ibid.* The Commission found Bernstein's testimony "dubious" when he claimed that he was unaware of Sharifan's continued participation until petitioner obtained new counsel in January 1990 and when he explained that the continued participation of the alien partner was not explained in the April 1990 letter to the Commission because Bernstein "thought there was a second alien." The Commission pointed out that "the letter says nothing about a second alien." *Id.* at 81a.

b. The Commission denied petitioner's petition for reconsideration. Pet. App. 22a. The Commission rejected petitioner's claim that Franklin was not credible and that the Commission erred in relying on the ALJ's determination that petitioner lacked candor because the ALJ failed to make any credibility or demeanor findings about the testimony of the three partners who testified. *Id.* at 16a-17a. The Commission emphasized that, in concluding that petitioner lacked candor, it was not persuaded by petitioner's attempts to impeach Franklin. It noted that, in the Commission's initial decision, "[t]he Commission also recognized (as [petitioner] now observes) that the ALJ's adverse credibility findings do not single out [petitioner's] three testifying partners," but the Commission "nevertheless found that the ALJ's credibility findings were not in conflict with the record evidence and therefore were entitled to decisional

deference." *Id.* at 17a. The Commission also rejected petitioner's challenge to the nature of the sanction imposed compared to that imposed in other cases. *Id.* at 7a-19a.

3. The court of appeals affirmed. Pet. App. 1a-3a. In an unpublished, *per curiam* order, the court held that "[s]ubstantial evidence supported the Commission's determination that [petitioner] lacked candor in failing to reveal that it had an alien general partner and that there had been a change in its partnership structure." *Id.* at 2a. The court noted that the Commission had independently reviewed the record, including "both the testimony of [petitioner's] witnesses and the significant documentary evidence," and that the evidence "was sufficient to support the Commission's conclusion that [petitioner's] partners knowingly and intentionally withheld relevant information from the Commission." *Ibid.* The court concluded that the Commission therefore had "ample basis" to sanction petitioner for its misconduct and that the revocation determination was "well within the agency's broad discretion to apply an appropriate sanction to licensee misconduct." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-13) that the decision below conflicts with a number of decisions by other Circuits regarding the minimal standards required for credibility findings by administrative agency adjudicators. Petitioner also asserts (Pet. 13-16) that, even if there were not such a conflict, the Court should grant review to establish such standards.

Contrary to petitioner's claim, the decision below does not create a conflict with decisions of other Cicuits regarding administrative credibility determinations. The court of appeals did not purport to address that

issue. The court simply ruled that the Commission's conclusion, based on the Commission's independent review of the record, including the testimony and documentary evidence, was supported by substantial evidence. Pet. App. 2a. Petitioner does not identify any legal error in the ruling below and the matter does not warrant further review.

1. Petitioner contends (Pet. 9-13) that review is warranted because the court of appeals upheld an agency ruling that accorded deference to an ALJ's generalized credibility finding and, according to petitioner, that affirmance "effectively sanctions" such findings as acceptable. Pet. 11. Petitioner claims that the ruling presents a "clear conflict" with the decision of the Fourth Circuit in *Be-Lo Stores* v. *NLRB*, 126 F.3d 268 (1997), and other circuit court rulings regarding the deference due credibility determinations by agency adjudicators.

The court of appeals' unpublished, summary order in this case does not conflict with the Fourth Circuit's decision in *Be-Lo* or any other case cited by petitioner. In *Be-Lo*, the court of appeals declined to defer to a "perfunctory footnote" in an ALJ's decision in which the ALJ credited all 37 witnesses of one party and discredited all 43 witnesses of the other party. 126 F.3d at 278-279. The footnote simply listed each of the witnesses whose testimony was credited and each of the witnesses whose testimony was not credited, "[i]n so far as there [were] inconsistencies." *Id.* at 278. The court of appeals noted that the ALJ made a single conclusory statement that many of the discredited witnesses committed perjury because they were "terrified about their job security" or were "merely mistaken." *Id.* at 278-279. And the court of appeals emphasized that the administrative review board (the National Labor Relations Board) "just as perfunctorily affirmed

the ALJ in but a single sentence within a footnote." *Id.* at 279. It is in that circumstance that the court of appeals deemed the ALJ credibility finding too generalized and conclusory to warrant "ordinary deference." *Ibid.* And the decisions of other circuits cited by petitioner (Pet. 11-12) are no broader, standing simply for the general propositions that, when making credibility determinations, administrative adjudicators should make express findings, give reasons for discrediting testimony, be sufficiently specific to allow plenary review of the record, and provide cogent reasons for their findings.[3]

The decision by the Federal Communications Commission that was affirmed by the court of appeals in this case met those standards. By contrast to the Board decision under review in *Be-Lo*, the Commission decision in this case was based on the Commission's independent review of the record and contained detailed analysis of the credibility of conflicting statements in the witnesses' testimony. The Commission credited the testimony of one witness over the testimony of others after fully evaluating the motives underlying the witnesses' conflicting testimony as well as considering the documentary evidence and finding that it supported the witness credited by the Commission and not the contrary testimony.

And, significantly, the Commission specifically analyzed the testimony of the partner who had certified the

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[3] Petitioner's contention (Pet. 13-16) that the Court should grant review, even in the absence of any circuit conflict, in order to provide "minimal standards for credibility findings" Pet. 13, that would require "specificity and cogent reasoning in such findings," Pet. 14, is undermined by these very cases cited by petitioner which provide such guidance.

truthfulness of the false information contained in the amendment filed with the Commission that formed the basis for the Commission's conclusion that petitioner lacked candor. The Commission made an independent determination that the testimony of that partner was "not credible nor supported by the record" when he claimed that he relied on the assurances of petitioner's attorney and manager that the matter of the alien partner "had been taken care of." Pet. App. 73a. The Commission found, in light of a number of circumstances, that the partner's testimony was implausible when he claimed that he would not have realized that there was something false in the amendment. For example, the Commission explained that the amendment was evidently false, even based on the partner's own testimony that he believed that the partnership had been changed to remove the alien partner, because the list of partners on the amendment remained the same as the list of partners on the original application and the amendment stated that there was no change in the ownership. See *id.* at 75a-76a. The Commission concluded that, "it is simply not credible that," if the partner had been informed at the December partnership meeting that "the alien problem was 'taken care of' by replacing the alien partner * * *, he would have signed an amendment less than one month later that states there is no change in ownership without focusing on the alien matter or on the ownership change effected by the substitution." *Id.* at 76a.

Thus, petitioner is wrong in contending (Pet. 11) that the court of appeals' affirmance of the Commission's decision in this case "effectively sanctions generalized conclusory 'credibility findings' as acceptable." The court of appeals correctly ruled that the Commission's decision was supported by substantial evidence, which

is the appropriate inquiry upon review of an agency decision after a formal hearing. 5 U.S.C. 706(2)(E). That standard is "extremely deferential to the fact-finder," *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 149 (1997), and simply requires "more than a mere scintilla" of support for an agency's conclusion. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). As demonstrated above, the evidence in this case amply met that standard and petitioner's assertion (Pet. 8-9 n.3) that review is warranted because it is not clear whether the Commission would have reached the same result absent the ALJ credibility determination is without merit.

2. In the course of discussing the procedural history of the case, petitioner also asserts (Pet. 8) that the decision below conflicts with this Court's ruling in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that an agency decision "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order." Pet. 8 (quoting *Chenery Corp.*, 318 U.S. at 94; and citing *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962) ("an agency's discretionary order [may] be upheld, if at all, on the same basis articulated in the order by the agency itself")). Petitioner does not cite that alleged conflict as a reason for granting the petition.

In any event, no such conflict exists. The court of appeals expressly stated that its affirmance of the Commission's decision in this case was "essentially for the reasons stated by the Commission," and cited the substantial evidence that supported the Commission's determination. Pet. App. 2a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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